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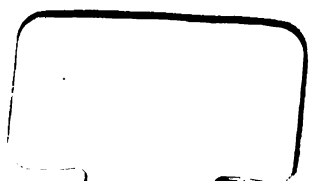
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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

Courts of Exchequer & Exchequer Chamber,

FROM

MICHAELMAS TERM, 1 VICT.

TO

EASTER TERM, 1 VICT., BOTH INCLUSIVE.

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.



BY

R. MEESON, Esq., AND W. N. WELSBY, Esq.,

OF THE MIDDLE TEMPLE, BARRISTERS AT LAW.



VOL. III.



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JUDGES
OF THE
COURT OF EXCHEQUER,
DURING THE PERIOD COMPRISED IN THIS VOLUME.

The Right Honorable JAMES, Baron ABINGER,
Lord Chief Baron.

BARONS.

Sir JAMES PARKE, Knt.
Sir WILLIAM BOLLAND, Knt.
Sir EDWARD HALL ALDERSON, Knt.
Sir JOHN GURNEY, Knt.

ATTORNEY-GENERAL.

Sir JOHN CAMPBELL, Knt.

SOLICITOR-GENERAL.

Sir ROBERT MOUNSEY ROLFE, Knt.

ERRATA.

- Page 117, note (b), for Scott, read Selwyn.
120, lines 6 and 7, for discharged, read absolute.
169, marginal note, line 4 from bottom, for could, read could not.
189, line 12, for plaintiff, read defendant.
202, line 8, for in, read of.
285, line 13, for *Powell v. Fisher*, read *Powell v. Petre* (since reported,
5 Ad. & Ell. 818, 1 Nev. & P. 223.)
328, last line of marginal note, *dele* the first.
458, 460, note (a), for 291, read 288.

A

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ARGUED AND DETERMINED

IN

The Courts of Exchequer,

AND

Exchequer Chamber.

MICHAELMAS TERM, 1 VICTORIÆ.

PRIESTLEY v. FOWLER.

CASE.—The declaration stated that the plaintiff was a servant of the defendant in his trade of a butcher; that the defendant had desired and directed the plaintiff, so being his servant, to go with and take certain goods of the defendant's, in a certain van of the defendant then used by him, and conducted by another of his servants, in carrying goods for hire upon a certain journey; that the plaintiff, in pursuance of such desire and direction, accordingly

Declaration in case stated that the plaintiff was a servant of the defendant in his trade of a butcher; that the defendant had desired and directed the plaintiff, so being his servant, to go with and take certain goods of the

defendant in a certain van of the defendant then used by him, and conducted by another of his servants, in carrying goods for hire upon a certain journey; that the plaintiff, in pursuance of such desire and direction, accordingly commenced and was proceeding, and being carried and conveyed by the said van, with the said goods; and it became the defendant's duty to use proper care that the van should be in a proper state of repair, and should not be overloaded, and that the plaintiff should be safely and securely carried thereby: nevertheless that the defendant did not use proper care that the van should not be overloaded, or that the plaintiff should be safely and securely carried; in consequence of the neglect of which duties, the van gave way and broke down, and the plaintiff was thrown to the ground, and his thigh fractured:—*Held*, on motion in arrest of judgment, after verdict for the plaintiff, first, that it was sufficiently to be collected from the declaration that the defendant directed the plaintiff to go in the van; but, secondly, that, even in that case, the action was not maintainable.

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commenced and was proceeding *and being carried and conveyed by the said van*, with the said goods ; and it became the duty of the defendant, on that occasion, to use due and proper care that the said van should be in a proper state of repair, that it should not be overloaded, and that the plaintiff should be safely and securely carried thereby : nevertheless, the defendant did not use proper care that the van should be in a sufficient state of repair, or that it should not be overloaded, or that the plaintiff should be safely and securely carried thereby, in consequence of the neglect of all and each of which duties the van gave way and broke down, and the plaintiff was thrown with violence to the ground, and his thigh was thereby fractured, &c. Plea, not guilty.

At the trial before *Park, J.*, at the Lincolnshire Summer Assizes, 1836, the plaintiff, having given evidence to shew that the injury arose from the overloading of the van, and that it was so loaded with the defendant's knowledge, had a verdict for 100*l.* In the following Michaelmas Term, *Adams, Serjt.*, obtained a rule to shew cause why the judgment should not be arrested, on the ground that the defendant was not liable in law, under the circumstances stated in the declaration. In Hilary Term,

Goulburn, Serjt., and *N. R. Clarke*, shewed cause.—The declaration is sufficient, at least after verdict. One objection will probably be, that it does not state that the plaintiff was to be conveyed in the van, but only that he was to go with and take *the goods* by the van. But, taking all the allegations together, the statement is sufficient after verdict. It is stated that the plaintiff was on the van in pursuance of the defendant's directions. [The Court intimated that the declaration was sufficient as to this point].

Secondly, the action is maintainable on general principles of law. There is no valid distinction between this case

and that of an ordinary coach passenger; the service of the servant is the consideration here, as the money of the passenger is there. [Lord *Abinger*, C. B.—The passenger pays his money in consideration of being carried, and there is an implied contract that he shall be carried safely: and he has no means of knowing how the coach is constructed or loaded. Here the servant is on the premises, and has the means of knowledge. It is not the case of a servant hired for that particular occasion, but of a general servant.] It does not appear on the face of the declaration, that the plaintiff knew the van was overloaded, and it cannot be intended after verdict: on the other hand, it does appear that the defendant knew it. The question therefore is, whether a master, who directs a servant to get upon an overloaded vehicle, the servant giving his service for taking care of the master's goods carried therein, is not liable if the servant sustains an injury by its breaking down in consequence of such overloading. It is not merely the omission of not using a sufficient vehicle, but an act of commission in allowing it to be overloaded. Suppose a coach passenger saw, when he got up, that the coachman was intoxicated or the horses unruly, would his right to recover for an injury in consequence be affected? [*Parke*, B.—I apprehend the contract would only be to carry as safely as could be, in the condition in which the passenger knew the vehicle to be. Lord *Abinger*, C. B.—Could a stage-coachman, who has a restive horse to drive, which he knows to be so, sue his master for an injury done him by the horse? The plaintiff was not bound to go by an overloaded van; he consents to take the risk. If it had appeared that the master *undertook* that the van was sufficient, it would be different.] It might have been more proper to allege that the defendant so undertook, but the declaration is in substance equivalent to that, at least after verdict, since it states that it was the defendant's duty to

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use proper care that the van should not be overloaded. The promise and the duty are co-extensive.

Adams, Serjt., contra.—The cause of action, supposing that any exists, arises out of an implied contract on the part of the master so to load the van as that the plaintiff should be carried safely ; but he cannot be made liable in this action *on the case* except there be a common-law liability, such as to raise a *duty*. To found any action against the defendant, several circumstances must combine. First, it must appear that the carriage was overloaded by the defendant's direction or with his knowledge ; and this it may be admitted the declaration does disclose. Secondly, it ought to appear that the plaintiff was ignorant of the overloading, which is no where suggested. Thirdly, the defendant must have ordered the plaintiff to go on the van. There is no clear averment that that was the fact ; the " desire and direction " of the defendant, in pursuance of which the plaintiff alleges that he went on the van, is only to go *with* it and take care of the goods. [Lord *Abinger*, C. B.—That is an ambiguous expression ; the plaintiff interprets the ambiguity to mean that he was to go in the van ; and we may so interpret it after verdict.] But further, it ought to be shewn that it was necessary for the plaintiff to do so in order to perform his duty ; and (which is perhaps the same proposition in more general terms), that the order was a lawful command, which he was bound as a servant to obey. The mere command of the master will not render him liable, unless the thing commanded fell fairly within the necessity of the servant's duty. There ought to have been an averment that it was necessary for the performance of his duty of conveying the goods that he should go in the van. But even if all these circumstances concurred, they would not constitute a common-law liability, but a liability arising out of a contract, and the action should have

been assumpsit, not case. To render the defendant liable in case, the existence of *malice*, express or implied, was necessary.

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Cur. adv. vult.

The judgment of the Court was now delivered by

LORD ABINGER, C. B.—This was a motion in arrest of judgment, after verdict for the plaintiff, upon the insufficiency of the declaration. [His lordship stated the declaration.] It has been objected to this declaration, that it contains no premises from which the duty of the defendant, as therein alleged, can be inferred in law; or, in other words, that from the mere relation of master and servant no contract, and therefore no duty, can be implied on the part of the master to cause the servant to be safely and securely carried, or to make the master liable for damage to the servant, arising from any vice or imperfection, unknown to the master, in the carriage, or in the mode of loading and conducting it. For, as the declaration contains no charge that the defendant knew any of the defects mentioned, the Court is not called upon to decide how far such knowledge on his part of a defect unknown to the servant, would make him liable.

It is admitted that there is no precedent for the present action by a servant against a master. We are therefore to decide the question upon general principles, and in doing so we are at liberty to look at the consequences of a decision the one way or the other.

If the master be liable to the servant in this action, the principle of that liability will be found to carry us to an alarming extent. He who is responsible by his general duty, or by the terms of his contract, for all the consequences of negligence in a matter in which he is the principal, is responsible for the negligence of all his inferior agents. If the owner of the carriage is therefore responsible for the sufficiency of his carriage to his servant, he

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is responsible for the negligence of his coach-maker, or his harness-maker, or his coachman. The footman, therefore, who rides behind the carriage, may have an action against his master for a defect in the carriage owing to the negligence of the coach-maker, or for a defect in the harness arising from the negligence of the harness-maker, or for drunkenness, neglect, or want of skill in the coachman; nor is there any reason why the principle should not, if applicable in this class of cases, extend to many others. The master, for example, would be liable to the servant for the negligence of the chambermaid, for putting him into a damp bed; for that of the upholsterer, for sending in a crazy bedstead, whereby he was made to fall down while asleep and injure himself; for the negligence of the cook, in not properly cleaning the copper vessels used in the kitchen: of the butcher, in supplying the family with meat of a quality injurious to the health; of the builder, for a defect in the foundation of the house, whereby it fell, and injured both the master and the servant by the ruins.

The inconvenience, not to say the absurdity of these consequences, afford a sufficient argument against the application of this principle to the present case. But, in truth, the mere relation of the master and the servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself. He is, no doubt, bound to provide for the safety of his servant in the course of his employment, to the best of his judgment, information, and belief. The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself; and in most of the cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it as the master. In that sort of employment, especially, which is described

in the declaration in this case, the plaintiff must have known as well as his master, and probably better, whether the van was sufficient, whether it was overloaded, and whether it was likely to carry him safely. In fact, to allow this sort of action to prevail would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on the behalf of his master, to protect him against the misconduct or negligence of others who serve him, and which diligence and caution, while they protect the master, are a much better security against any injury the servant may sustain by the negligence of others engaged under the same master, than any recourse against his master for damages could possibly afford.

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We are therefore of opinion that the judgment ought to be arrested.

Rule absolute.

ATTORNEY-GENERAL v. CATT.

THIS was an information founded on the 6 Geo. 4, c. 108, s. 45, and the 3 & 4 Will. 4, c. 53, s. 44, the venue being laid in Middlesex. The first count charged that the defendant, on the 28th July, 1833, at Ratcliffe, in the county of Middlesex, assisted and was otherwise concerned in the unshipping of certain goods, to wit, 16,380 lbs. of foreign

In an information on the 3 & 4 Will. 4, c. 53, s. 44, the venue being laid in Middlesex, one count charged the defendant with assisting and being concerned

in unshipping goods liable to the duties of customs, the duties for the same not having been first paid or secured. Another count charged him with harbouring and concealing goods which had been illegally unshipped, the duties due thereon not having been first paid or secured. Other counts charged the defendant with being concerned in the unshipping of goods prohibited to be imported, and which had been imported into the United Kingdom; and with harbouring goods prohibited to be imported, which had been imported, &c.

It was proved on the trial, that the defendant, in England, concerted with M. a plan for smuggling tobacco into Ireland; that, in performance of such concerted plan, he took on board his vessel, on the high seas, from a cutter dispatched from Flushing for the purpose, a cargo of tobacco in illegal packages, sailed with it to Neath, in Glamorganshire, there took on board a quantity of opium, in order to conceal the tobacco, and sailed thence to Youghal, in Ireland, where he landed the tobacco:—*Held*, that the defendant was properly triable in England, as having, in England, assisted and been concerned in an illegal unshipping of prohibited goods within the statute, viz. the transhipment of them from the foreign vessel to his own.

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tobacco, of the value of 2,457*l.*, the same being then and there goods liable to the payment of duties of customs, the said duties for the same not having been first paid or secured, whereby the defendant had forfeited the sum of 7,371*l.*, the Commissioners of his Majesty's Customs having elected that the forfeiture of treble the value of the goods should be sued for instead of the penalty of 100*l.* The second count charged, that the defendant did knowingly harbour, keep, and conceal, and knowingly permit and suffer to be harboured, kept, and concealed, other goods, to wit, &c., which had been then and there illegally unshipped, the duties of customs due thereon not having been first paid or secured, the same being liable to the payment of duties, he the defendant well knowing that the same were goods that had been illegally unshipped as aforesaid. The third count charged that the defendant assisted and was otherwise concerned in the unshipping of other goods, to wit, &c., the same being then and there goods prohibited to be imported into the United Kingdom, which had been brought beyond the seas, and imported into the United Kingdom, contrary to the form of the statute, &c. The fourth count charged that he knowingly harboured, &c. goods prohibited to be imported, &c., (as in the third count). There were four other counts, charging similar acts as having been committed on the 13th February, 1834. The defendant pleaded Not guilty.

At the trial before Lord *Abinger*, C. B., at the Middlesex Sittings after last Hilary Term, the following facts were proved :—In September, 1833, the defendant, who was the master of a brig called the *Hope*, belonging to the port of Rye, concerted there with one *Moylan*, (who appeared as a witness for the Crown), a plan for smuggling foreign tobacco into Ireland. *Moylan* was to give the defendant 550*l.* for the voyage, of which 50*l.* was then paid to him in hand, and the defendant was to go to Hull, to sail from thence in ballast, ostensibly for Neath in Gla-

morganshire, and to meet off Lowestoffe a cutter from Flushing, which would be despatched for the purpose by one Minter, Moylan's agent at Flushing, and to receive the contraband tobacco on board from the cutter; then to proceed to Neath, and there take on board a cargo of culm, to be laid over the tobacco for the purpose of concealing it, and then to take the cargo of tobacco to the port of Youghal. The defendant accordingly sailed in the Hope to Hull, corresponded with Minter, and received on board from a Dutch vessel, on the high seas, 330 bales of tobacco, of 60lbs. each bale, and concealed them under the ballast: sailed to Neath, where he lay nine days, and took in a cargo of culm, which was laid over the tobacco, and then sailed for Youghal, where he landed the tobacco on the 13th February, 1834. This information was filed in July, 1836.

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For the defendant it was objected, that the venue ought to have been laid and the information tried in Ireland, where, it was contended, the only act of unshipping took place which fell within the prohibition of the statute (a). The Lord Chief Baron reserved the point, and a verdict having been found for the Crown, *Jervis*, in Easter Term, obtained a rule to shew cause why the verdict should not be set aside and a verdict entered for the defendant. In Trinity Term

The *Solicitor-General*, (*Tancred* and *Kaye* with him), shewed cause.—Either the defendant is liable as having knowingly harboured and concealed within the United Kingdom, viz. at Neath, the tobacco which had been illegally unshipped from the Dutch vessel into his own, or that unshipping was in itself an illegal unshipping within the statute. In either case he is triable in England, having been concerned in such illegal unshipping by his transac-

(a) See *Attorney-General v. Kenifeck*, 2 M. & W. 715.

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tions with the witness Moylan. The case of the *Attorney-General v. Tomsett* (a) is expressly in point. That case decided that the taking on board contraband goods at sea was an illegal unshipment. (He was then stopped by the Court,)

Jervis, for the defendant.—The question is, whether the terms of the statute are satisfied by an unshipping at sea into a vessel in which they are intended to be run into the United Kingdom. The clause in question, 3 & 4 Will. 4, c. 53, s. 44, enacts, that every person who shall, either in the United Kingdom or in the Isle of Man, assist or be otherwise concerned in the unshipping of any goods which are prohibited to be imported, or *the duties for which have not been paid or secured*, or who shall knowingly harbour, &c., any goods which have been illegally unshipped *without payment of duties*, or any goods prohibited to be imported, &c., shall be liable to the penalties therein mentioned. Now, the unshipping on the high seas cannot be the unshipping contemplated by the act of Parliament, because, until the goods arrive at their port of discharge, no duties are payable on them; and the act is directed against an unshipment without payment of duties, the duties having attached, or an unshipment of goods prohibited sub modo, because packed in illegal packages, but which, if in legal packages, would be then liable to duty. But the counts which describe the goods as prohibited goods go further, and state that they had been *imported*. Now the going into Neath merely for the purpose of better securing the contraband cargo—a purpose unconnected with the landing of the goods—was not an importation. Lord *Hale* says (b): “The duty is not due only by the coming of a ship into an English port; for so he might do for safeguard, or to stay for a wind, and *without*

(a) 2 C. M. & R. 170.

Customs, s. 20; Harg. Law Tr.

(b) Treatise concerning the 216.

any intention of merchandize; and the customs are due only from such goods as are imported for merchandize." The jury could never have doubted that there was no intention to import the goods into Neath. The case of the *Attorney-General v. Tomsett* is distinguishable. The argument there was merely that there was a "being concerned in the unshipping" within the United Kingdom, and the point as to the description of the goods, whether they were "liable to the duties" when unshipped, was not taken. The seventh count of the present information differs also from the first count of the information in that case in alleging that the goods *had been imported*. [*Alderson, B.*—What objection is there to the sixth count?] It contemplates an unshipping in the United Kingdom, the duty having attached. It would be perfectly legal to unship the goods off the coast of Holland; the duties could not be there paid or secured. The count clearly refers to a harbouring of the goods after they had been illegally run.

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The *Solicitor-General* in reply.—The sixth count meets the case fully. It is for harbouring, in the United Kingdom, tobacco liable to the payment of duties which had been illegally unshipped, the duties not having been first paid or secured. [*Lord Abinger, C. B.*—The question is, does not that mean first paid or secured before the unshipping?] No—before the harbouring, the offence charged. Again, the construction put by the other side on the word "imported," in the seventh and eighth counts, is absurd. It cannot mean imported for consumption, under circumstances which rendered duty payable, because the goods are alleged to be *prohibited* from importation. [*Alderson, B.*—The counts are perfectly good without the averment that the goods had been imported; the statute is only directed against unshipping or harbouring goods *prohibited to be imported*.]

Cur. adv. vult.

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The judgment of the court was now delivered by

Lord ABINGER, C. B.—The third count of this information charges the defendant with penalties of treble the value of a quantity of foreign tobacco, which it is alleged he was, at Ratcliffe, in the county of Middlesex, concerned in unshipping, the same being goods prohibited to be imported into the United Kingdom.

The facts of the case are these :—The defendant was master of a vessel called the *Hope*, belonging to the port of Rye. At Rye, and also in London, he held consultations with a witness of the name of Moylan, with whom he agreed, in consideration of receiving 550*l.*, part of which, 50*l.*, was paid in hand, to take his vessel to Hull, to correspond from thence with a person of the name of Minter, at Flushing, then to take his vessel near to the coast of Holland, and to receive from a vessel which Minter was to dispatch for that purpose, a number of bales of tobacco; then to proceed to Neath, in Glamorganshire, to receive on board a cargo of culm, which was to be laid over the tobacco, for the purpose of concealing it, and then to take the cargo of tobacco, in that vessel, to Youghal, in Ireland.

This agreement was executed: the defendant went with his vessel to Hull; he wrote to Minter; he then sailed in ballast, ostensibly for Neath. On the high seas, off the coast of Holland, he received on board the *Hope*, from a Dutch vessel, 330 bales of tobacco, 60 lb. in each bale, and concealed them under the ballast. He went first to Yarmouth roads, in the Isle of Wight, where the vessel was overhauled by revenue officers, who, however, did not discover the tobacco: from thence he sailed in the vessel to the port of Neath, lay there a considerable time, took in a cargo of culm, placed that over the tobacco, sailed to Youghal, in Ireland, and there he landed the tobacco.

It has been objected by the counsel for the defendant,

that the only act of unshipping of this tobacco was in Ireland, where, of consequence, the information ought to be tried; to which it was answered, that the transshipping it from the Dutch vessel to the Hope, on the high seas, with intent to take it to Neath, and afterwards to Youghal in Ireland, where it was to be landed, was an unshipping within the meaning of the statute of 6 Geo. 4, cap. 108, s. 45; and that the defendant was concerned in England in that unshipping. It is by that section enacted, "that every person who shall, either in the United Kingdom or the Isle of Man, assist or be otherwise concerned in the unshipping of any goods which are prohibited, or the duties for which have not been paid or secured, shall forfeit either the treble value thereof, or the penalty of 100*l.*, at the election of the commissioners of his Majesty's Customs:" and it is averred in the information, that the commissioners of the customs have elected to proceed for the treble value.

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The tobacco in question was prohibited to be imported, being packed in bales of 60 lbs. each, whereas the statute 6 Geo. 4, c. 107, s. 52, in the table, prohibits its importation unless in hogsheads, casks, chests, or cases, weighing 450 lbs.; if from the East Indies, the weight required is 100 lbs.

The question for the consideration of the Court is, whether the defendant, having, at Rye and in London, arranged this plan, which he afterwards executed to the very letter, has or has not, in England, been concerned in unshipping goods which were prohibited, which were intended to be, and which were, brought by him into the United Kingdom; first into Neath, in Glamorganshire, and afterwards into the port of Youghal, in Ireland, where they were actually landed by the defendant himself.

The act of parliament has not required that the unshipping should be within the United Kingdom. The offence

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consists in being, within the United Kingdom, concerned in the unshipping.

The case of *The Attorney-General v. Tomsett*, which was decided in this court in Easter Term, 1835, involved this very question. In that case, the defendant, at Dover, hired a Dover hoy, to meet, in her voyage to London, a boat from the French coast, with a cargo of foreign silks, which she was to receive on board the hoy, and convey to London, concealed under the ballast. The Dover hoy did meet that boat accordingly, about two miles from the shore, within limits which commissioners appointed under the statute 13 & 14 Car. 2, cap. 11, had assigned to the port of Dover: she received the silks from that vessel, and brought them into the port of London, where they were discovered and seized. The Court decided, that the defendant, having made this arrangement at Dover, was concerned in the unshipping, and that this unshipping from the French boat to the hoy, with a view to their being laid on land, was an illegal unshipment within the meaning of this act of Parliament, without any reference to the limits of the port of Dover. And the Court sees no reason to differ from that judgment.

The principle in this case is the same; whether the unshipping be from a small to a large vessel, or from a large to a small vessel, or from a vessel into the sea, which, in the case of tubs of liquor, is of frequent occurrence, cannot make any difference. Whether the unshipping be within two miles of the English coast, or whether it be within two miles of the coast of Holland, cannot make any difference. In either case, the act is on the high seas, and without the limits of any English county. We are therefore of opinion, that the unshipping in this case was an unshipping within the meaning of the act of parliament, and this rule must be discharged.

Rule discharged.

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TROVER for oats. Pleas—first, not guilty; secondly, that the goods in the declaration mentioned were not, nor was any part thereof, the property of the plaintiff; thirdly, a plea justifying the detention of the goods under a foreign attachment issued out of the Tolzey Court at Bristol, at the suit of the defendants, against one John Coombe, for a debt of 550*l.*, and delivered to R. P., one of the officers of the said Court, to be executed; and alleging that Coombe had delivered the goods in the declaration mentioned to one James Harris, to be sold by him as the agent of and for the use of Coombe, and that Harris afterwards, and before the said time when, &c., delivered the said goods, the same being the proper goods of Coombe, and being and remaining within the jurisdiction of the said Court, to the plaintiff, to hold them as the servant of him the said Harris, and until the said goods should be sold and disposed of for the use of Coombe as aforesaid; whereupon afterwards, and whilst the said writ of attachment was in full force, and whilst the said goods, so being the goods of Coombe, remained and continued in the possession of the plaintiff for the purpose aforesaid, to wit, at the said time when, &c., and whilst the said goods were within the jurisdiction aforesaid, the said R. P., as such officer of the said Court, under and by virtue of the said writ, and within the jurisdiction aforesaid, attached the said Coombe by his goods, by seizing and taking the said goods, and carried them away to a place of safe custody within the jurisdiction aforesaid, and there detained them under and by virtue of the said writ, as he lawfully might, &c.; which are the said supposed trespasses, &c.

took possession of the cargo, as a security for his own claim on C., and it was afterwards taken out of his possession by the defendants, who also were creditors of C., under a foreign attachment against C. out of the Tolzey Court of Bristol:—*Held*, that B. had not such a property in the goods as to enable him to maintain trover against the defendants.

C., a merchant at Waterford, had been in the habit of consigning cargoes of grain to B., a corn-factor in Bristol, who had been accustomed to accept bills on the faith of such consignments. C. wrote to B., stating that he was about to ship him a cargo of oats, and that he had drawn on him for 550*l.* in anticipation of it, and desiring him to effect an insurance on the cargo. C. remitted the bill to B., and he accepted it. Before the vessel sailed, C. stopped payment, and he then sent the bill of lading, indorsed in blank, to F., another factor at Bristol, not informing him of his engagement with B. When the vessel arrived, F., for his own convenience, transmitted the bill of lading to B., desiring him to act for him. B. paid the freight, and

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Replication to the last plea, that before the issuing of the attachment therein mentioned, to wit, on the 20th December, 1836, it was agreed by and between the said John Coombe and the plaintiff, that Coombe should cause the said goods to be shipped at Waterford, in Ireland, for the port of Bristol, and would on the arrival of the goods in the port of Bristol cause the same to be delivered to the plaintiff, to be sold by him on account of him, Coombe, and that the plaintiff should cause an insurance to be effected upon the goods from the port of Waterford to the port of Bristol, and should pay the freight on account of Coombe, and should accept a bill of exchange to be drawn upon him by Coombe for 550*l.* on account of the said goods; and that the plaintiff should hold the goods when they should so have been delivered to him, and the proceeds thereof, after deducting the commission and charges thereon, as a security and fund out of which the plaintiff might be repaid all monies expended by him in effecting such insurance and in paying such freight and acceptance. The plaintiff then averred, that Coombe, in pursuance of the agreement, and before the issuing of the attachment, caused the goods to be shipped at Waterford for Bristol, that the plaintiff caused the insurance to be effected, accepted a bill drawn on him by Coombe for 550*l.*, on account of the goods; that Coombe did cause the goods to be delivered to the plaintiff at Bristol, whereupon the plaintiff paid the freight, amounting to 30*l.* 2*s.* 10*d.*, and received and took the goods into his possession, under the agreement and for the purpose therein expressed, and retained the same until the conversion complained of; and that he paid the bill of exchange for 550*l.* when due, viz. on the 23rd of February, 1837. Verification.

Rejoinder, that Coombe did not, in pursuance of the alleged agreement in the replication mentioned, cause the goods or any part thereof to be shipped, nor did he cause the goods or any part thereof to be delivered to the plain-

tiff, in manner and form as in the replication alleged: on which issue was joined.

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At the trial before *Tindal*, C. J., at the last Bristol assizes, the facts appeared to be as follows:—Coombe, a corn-merchant at Waterford, had been in the habit of consigning cargoes of grain, &c., to Bruce, who carried on business in Bristol as a corn and provision merchant and commission agent, for sale on commission; and Bruce had been in the habit of accepting bills on the faith of such cargoes. On the 12th of December, 1836, Coombe wrote to Bruce as follows: "I note your market continues bare of good oats, of which I will ship you a cargo per first opportunity. . . . Should prices decline during the week, I may probably draw on your house again in anticipation, for 500*l.* or 600*l.*" On the 20th of December, Coombe wrote again to Bruce: "Conformably with the intimation given in my last, I have again valued on your house for 550*l.* in anticipation, at two months' date. Some coal-laden vessels are now arriving, and I hope a few days may enable me to procure freight for a cargo of good oats, and which, from the tenor of your letter, I infer you will wish to have at Bristol rather than Gloucester." A bill of exchange for 550*l.* was accordingly inclosed in this letter, which Bruce, on the 27th, accepted and returned to Coombe. On the 5th of January Coombe wrote again to Bruce as follows: "After a long and determined struggle against our ship-brokers and high freight, I have at length succeeded in effecting a small reduction of 2*s.* per ton. And on receipt hereof I will thank you to insure 600*l.* on oats, per *Blenheim*, A. 1, of Waterford, D. Doody, master, from hence to Bristol. I believe the vessel will be ready to commence loading in a day or two." On the 13th of January he wrote: "About 400 barrels of the oats are already on board, and I hope to complete the shipment to-morrow or Monday next." On the 23rd Coombe wrote to Bruce, informing him that he was under the necessity

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of suspending his payments: and, on the same day, he sent the bill of lading of the oats, signed by Doody, the master of the *Blenheim*, and indorsed by Coombe in blank, to Mr. James Harris, a corn-merchant in Bristol, inclosed in a letter in which he stated that the vessel was ready for sea, and desired Harris to sell the oats for his (Coombe's) account on their arrival, but gave him no intimation of his previous engagement with Bruce, or of the embarrassed state of his affairs. Harris, immediately on receiving the bill of lading, sent it to Bruce, requesting him to act for him in the business. On the arrival of the vessel at Bristol, the 31st January, Bruce took possession of the cargo, and paid the freight. The defendants, Messrs. Wait and James, who were creditors of Coombe, also claimed to take the cargo under the foreign attachment stated in the pleadings, and subsequently the officer of the Court came on board the vessel, took possession of the cargo, and delivered it over to the defendants.

On this evidence, the Lord Chief Justice was of opinion that the plaintiff had made out no right of possession, and accordingly directed a nonsuit.

Erle now moved for a new trial.—The questions in the cause are, first, whether there was an appropriation of the oats by Coombe to the plaintiff; secondly, if not, whether he had sufficient possession through Harris to maintain the action. It is submitted that, there having been a specific notice given by Coombe that this particular cargo was shipped to Bruce as consignee, and he having on the faith of that notice accepted a bill on account of the cargo, and so given value for it to the consignor, the property passed to the plaintiff, without reference to the transfer of the bill of lading. In *Fisher v. Miller* (a), where A. consigned a cargo for sale to B., B. being in correspond-

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ence and connected with the house of C., who had advanced money to A. on an engagement that the proceeds of the cargo should be remitted by B. to A. through C.'s hands, so as to constitute a security for the money advanced by C.; and A. wrote to B., informing him that the cargo was *not* responsible for C.'s advances; notwithstanding which B. remitted the proceeds to C., who retained them to cover his advances: it was held, in an action for the amount by A.'s assignees against B., that the jury were warranted in considering A.'s engagement as an appropriation of the cargo, which he could not rescind. In *Haille v. Smith* (a), where B., at Liverpool, being desirous of drawing on S. & Co.'s banking-house in London, agreed, as a security, to consign goods to a mercantile house trading under the firm of S. & A., but consisting of the same partners as the banking firm; and accordingly remitted the invoice of a cargo and the bill of lading indorsed in blank to S. & A., but the cargo was prevented by an embargo from leaving Liverpool, and B. became bankrupt, and the cargo was delivered by the captain of the vessel to his assignees: it was held that S. & A. might maintain trover for it against the captain. The transfer of the bill of lading, therefore, is clearly not the only mode of passing the property in a consignment. [Lord Abinger, C. B.—While the cargo is on board the ship, the only mode of delivery is by the bill of lading, unless the parties expressly stipulate to the contrary.] This case may be considered as if the bill of lading had remained in Coombe's hands. [Lord Abinger, C. B.—Not having transmitted the bill of lading, the question is, whether he might not deliver the cargo to whomsoever he pleased. It is plain his intention was that Bruce should not get it.]

At all events, Bruce was entitled to the possession by the delivery from Harris. Coombe treats Harris as his factor, and Harris puts Bruce in his place as such. The

(a) 1 Bos. & P. 563.

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property passes from Coombe to Harris, and from Harris lawfully to Bruce, he having at that time an equitable claim on the goods. Under these circumstances, Bruce, as such factor, has a special property as against third parties: *Nathan v. Giles (b)*. [Lord Abinger, C. B.—Bruce is no factor of Coombe's; he is only the agent of a factor.]

LORD ABINGER, C. B.—I think the learned Chief Justice was quite correct in directing a nonsuit. There is no colour to say there was any transfer of property to the plaintiff. Coombe committed something like a fraud in not performing his engagement with Bruce; then Bruce attempts to turn the tables on him by retaining the goods, when he had no right to take them, or at least to keep possession of them as against Coombe.

PARKE, B.—I am entirely of the same opinion. I think it is clear that there was no appropriation of the goods, so as to constitute a property in Bruce, before the bill of lading was sent: the property would therefore remain in the consignor. The transaction between Coombe and the plaintiff rested merely in agreement, and no property was transferred independently of the subsequent transactions, when the goods were placed in his hands for sale. As to that part of the case, if Coombe had authorized Harris to employ a broker for the sale of the goods, the argument for the plaintiff might apply, and that, although the parties did not intend that the particular broker employed should have a lien. But Coombe does not so authorize Harris: the goods, therefore, were in the hands of the plaintiff as the agent of Harris only, not of Coombe, and he had, consequently, no lien.

The rest of the Court concurred.

Rule refused.

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MANNING obtained a rule to shew cause why an attachment should not issue against Sir Charles Wetherell, as judge of the Tolzey Court at Bristol, for refusing to receive a writ of certiorari sued out in this case, under the following circumstances:—

The goods mentioned in the preceding case having been attached by the officer of the Tolzey Court, as therein stated, and he having (on the 14th February) so returned the writ, the plaintiff Bruce, on the 17th February, according to the custom of the Court, filed a claim of property, alleging the oats to be his, and praying judgment, and a return of the goods. To this Wait and James replied, on the 10th April, that the property in the goods, at the time of the attachment, was in Coombe, and not in Bruce, and concluded to the country; and having added the similitur, the cause was entered in the issue book for trial on the 11th May. On the 12th July, being the first Court afterwards held, Bruce's attorney produced a certiorari from the Court of Exchequer, to remove the suit then pending in the Tolzey Court, under the title of *Wait and James*, plaintiffs, *Coombe*, defendant, and *Bruce*, claimant; but Sir C. Wetherell, the Recorder of Bristol, then sitting as judge of the Tolzey Court, refused to allow the certiorari, on the ground that, by the stat. 21 J. 1, c. 23, s. 2 (a), it ought to have been sued out before issue

W. sued out of the Tolzey Court of Bristol a writ of foreign attachment against C., and seized goods of his under it. The writ was returned on the 14th February. On the 17th B. filed a claim of property, alleging the goods to be his, and praying a return of them. To this W., on the 10th April, replied, alleging that the property was in C., and not in B., concluding to the country; and added the similitur. On the 11th May, the suit was entered in the issue book for trial, and it came on for trial on the 12th July, when B. tendered a certiorari, sued out ex parte in the ordinary way, in this Court,

to remove the suit then pending in the Tolzey Court "under the title of W. plaintiff, C. defendant, and B. claimant:"—*Held*, on a motion for an attachment against the Judge of the Tolzey Court for refusing to receive this certiorari, that B. was not entitled to sue it out, under the stat. 21 Jac. 1, c. 23, s. 2.

(a) Which enacts, that no writ of certiorari, &c. to be sued out to stay or remove any action, bill, plaint, or cause brought, commenced, or depending in any court

or courts of record within any city, liberty, town corporate, or jurisdiction, shall be received or allowed by the steward or stewards, judge or judges, officer or

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joined. The issue was then called on for trial. Bruce's attorney protested against any proceedings being taken in it, but the learned judge decided to proceed, and a verdict was taken for the plaintiffs Wait and James, without any evidence having been adduced on either side. It appeared also that no summons had been issued to the plaintiff previously to the issuing of the attachment out of the Tolzey Court, and the affidavits on either side were contradictory as to whether it was the practice of the Court first to issue a summons.

Kelly shewed cause.—The learned Recorder having ruled that issue was joined according to the practice of the Court below, and that the certiorari was too late, this Court will decide upon the practice of the Court below, as it was ruled by the judge of that Court. Suppose the question were, what amounted to a sufficient joining of issue in this Court—this Court would be the sole judges on that question. So it was here, first and originally, a question for the judge of the Court below; and he is ready to certify that there was a joining of issue in the original cause, according to the practice of his Court. A Court of Error cannot inquire into or reverse the practice of the Court below. [*Parke, B.*—There is no custom to receive a certificate of the Recorder of Bristol, as there is of the Recorder of London; we must therefore, if necessary, be satisfied of the practice in the ordinary way, by affidavit, which need not be made by the Recorder, but may be made by an officer of the Court.]

officers of the court or courts wherein or to whom any such writ shall be directed and delivered, &c., except that the said writ be delivered to the steward, &c., before issue or demurrer joined in the said cause or causes so depend-

ing in any such court of record, &c., having power to hold such plea, so as the said issue or demurrer be not joined within six weeks next after the *arrest* or *appearance* of the defendant or defendants in such action or suit.

The certiorari was too late. There having been no *arrest* here, but an attachment of the person of Coombe, the original defendant, by his goods, the period of six weeks limited by the statute ought to be computed from the return of the attachment; or, at all events, the claim of property filed by Bruce was an *appearance* within the statute; and issue was not joined until more than six weeks from that date. But the certiorari cannot lie at all at the suit of this claimant, because, when the plaint is removed, there is no process whereby this Court can direct the issue to be tried anew. He is in this dilemma—either the certiorari was improperly obtained by him, not being a party in the suit, or else it was obtained in the collateral cause, in which issue has certainly been joined. Mr. Tidd says (a), “In the case of a customary proceeding by foreign attachment, if the defendant cannot find bail below, *he* may sue out a certiorari, and upon putting in bail in the Court above, the cause shall go on there.” By what process can this Court inquire whether the property is in the defendant or in a third party, between whom and the plaintiff there is no privity? In *Cross v. Smith* (b), Holt, C. J., says expressly, that in the case of an exempt jurisdiction, nobody can have a certiorari but the defendant. [Parke, B.—What could this Court do with the goods? they are in the possession of the inferior jurisdiction.] The order of this Court would not legalize its officer in taking possession of them; but even if the goods or the proceeds of them were brought into this Court, how could the claim of property be tried? No jury process could issue but on regular and good pleadings on either side, and issue joined thereon. [Parke, B.—A certiorari does not remove the cause in the state in which it then is, but the parties must begin *de novo*. How are they to begin here?

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(a) Tidd. Pr. 399, 9th edit.

(b) 2 Lord Raym. 837.

Esch. of Pleas, 1837. *Alderson, B.*—As soon as the cause was removed, the claimant would be out of Court.]

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The Court here called on

Manning to support the rule.—It is laid down in 1 Roll. Abr. 395, and 4 Vin. Abr. *Certiorari*, c. 1, that “where the Court which awards the certiorari cannot hold plea upon the record itself, there only a tenor shall be certified, because otherwise, if the record itself should be removed, there would be a failure of right afterwards.” That is an answer to the last argument urged on the other side. [*Parke, B.*—Does not that apply to the case of a certiorari where the record is brought up for evidence? The rule is, that on a certiorari removing the cause, the parties must begin de novo: the defendant appears in the Court above.] There is here a failure of justice unless the cause be removeable, because there is no complete judgment against Coombe; therefore there can be no writ of error; *Dr. Groenvell’s case (a)*. A certiorari lies to every Court of record, whether it holds pleas according to the course of the common law, or under a statutory establishment. The certiorari ought to have issued to enable this Court to inspect the record, and see whether, according to the proper practice of the Court below, issue was joined. [*Parke, B.*—You did not ask for the certiorari on that ground; if so, you ought to have pointed out some flaw in the proceedings or defect in the record. This certiorari was obtained entirely ex parte.] The *appearance* mentioned in the statute of James clearly means an appearance on summons, without arrest. It cannot be said that Coombe is precluded by the issue joined between Bruce and Wait from removing the cause: and it cannot be removeable by one party and not by another. *Fisher v.*

(a) 1 Lord Raym. 469.

Lane (a), and *M^r Daniel v. Hughes (b)*, are authorities to shew that a custom to issue a foreign attachment without a previous summons to the creditors of the garnishee, is bad. If, therefore, the record were before the Court, there would appear to be error.

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PER CURIAM.—The rule must be discharged with costs.

Rule discharged.

(a) 3 Wils. 297; 2 W. Bla. 834.

(b) 3 East, 367.

FARR v. WARD.

ASSUMPSIT for the price of cattle sold and delivered by the plaintiff to the defendant. The defendant pleaded several pleas, of which the only one which became material was, that in pursuance of an agreement to that effect between him and the plaintiff, he had paid for the cattle by a bill, which the plaintiff had accepted in satisfaction.

Where goods are sold and delivered, to be paid for by a bill at a certain date, if the bill be not given, interest on the price, from the time when the bill would have become due, may be recovered as part of the estimated value of the goods, on the common count for goods sold and delivered.

At the trial before *Gurney, B.*, at the last Carmarthen Assizes, it appeared that in 1835 the plaintiff sold the defendant certain cattle for 252*l.*; the defendant paid 32*l.* down, and it was agreed between them that for the remaining 220*l.* he should accept a bill at two months. He did accept the bill accordingly, and transmitted it by post to the plaintiff; and the question in the cause was, whether it ever came into the plaintiff's possession, or whether it was not abstracted by one Jenkins from the post-office. The jury found that it was so abstracted, and the learned Judge ruling, that, as by the agreement the cattle were to be paid for by a bill, the plaintiff was entitled to interest on the price from the date when the bill would have been payable, a verdict was found for the plaintiff, under his

Exch. of Pleas, Lordship's direction, for 244*l* 15*s.*, leave being reserved
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to the defendant to move to reduce the damages to 220*l*.

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Evans now moved accordingly.—No notice having been given under the 3 & 4 Will. 4, c. 42, s. 28, so as to entitle the plaintiff to claim interest by virtue of that clause, the question is, whether he is entitled to claim it independently of the statute; the proviso at the end of the above section leaving interest payable in all cases in which it was previously payable by law. If the plaintiff had declared specially on the agreement to pay by bill, he might probably have been entitled to recover interest; but this declaration was merely for goods sold and delivered, and entitled him only to recover the actual price of the cattle. In *Foster v. Weston* (a), where the defendants bound themselves by deed to pay 1500*l.*, to be delivered to a third party in goods for sale on the plaintiff's account, by three payments of 500*l.* each, at three, five, and seven months, it was held that the plaintiff could not recover interest, there being no express stipulation for its payment in the contract declared on. [*Parke, B.*—*Marshall v. Poole* (b) is an express authority against you. It was there held, that where goods are sold and delivered on an agreement by the buyer to pay for them by bill at a certain date, interest from the time when the bill would have become due may be recovered as part of the estimated value of the goods, on the common count for goods sold and delivered; and reference was made to a previous authority in the Exchequer Chamber (c).]

And, PER CURIAM,

Rule refused (d.)

(a) 6 Bing. 709; 4 Moo. & P. 428, n.
589.

(b) 13 East, 98.

(c) *Becker v. Jones*, 2 Camp.

(d) See *Mountford v. Willes*, 2 Bos. & P. 337; *Slack v. Lowell*, 3 Taunt. 157.

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LUCE v. IRWIN.

HUMFREY moved, on behalf of the bail in this cause, for a rule to shew cause why an exoneretur should not be entered on the bail-piece, on the ground of a variance between the affidavit to hold to bail and the declaration. The affidavit stated that the defendant was indebted to the plaintiff on a promissory note made by the defendant, and delivered by him to one Frayarty, *who indorsed it* to the plaintiff. The declaration stated, that the defendant made the note, and delivered it to Frayarty; that Frayarty indorsed it to Eyles, and Eyles to the plaintiff. He referred to *Willis v. Adcock (a)*.

Affidavit to held to bail stated the defendant to be indebted on a promissory note, made by him, delivered to F., and indorsed by F. to the plaintiff. The declaration was on a note made by the defendant, delivered to F., indorsed by F. to E., and by E. to the plaintiff:—*Held*, not a material variance.

LORD ABINGER, C. B.—That decision seems to have been wrong in the first instance, in considering the affidavit of debt sufficient, when on the face of it it was ambiguous. I think there is no ground for a rule in this case.

PARKE, B.—This is substantially the same note; there is only a supposed difference, which can mislead nobody. It seems difficult to see how the case of *Willis v. Adcock* can be supported.

GURNEY, B.—The plaintiff was entitled to have struck out the intermediate indorsement.

Rule refused.

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RAWLINGS *v.* TILL and Another.

Trespass for assaulting the plaintiff, *seizing and laying hold of him*, and imprisoning him. The defendant having pleaded not guilty, and a justification under a writ of *capias*, the plaintiff at the trial recovered a farthing damages:—*Held*, that the judge could not certify, under the stat. 43 Eliz., c. 6, to deprive the plaintiff of costs, for that a *battery* was admitted on the record.

TRESPASS. The declaration stated, that the defendants, on &c. assaulted the plaintiff, and then *seized and laid hold of him*, and then imprisoned the plaintiff, and forced and compelled him, as a prisoner and in custody, to go in and along divers public streets to a certain lock-up-house, and there imprisoned him, &c. &c. The defendants pleaded not guilty, and a justification under a writ of *capias ad respondendum*; to which latter plea the plaintiff replied, that the writ was sued out on a defective affidavit of debt, and was in consequence set aside for irregularity; which the defendant denied by his rejoinder. At the trial before Lord *Abinger*, C. B., at the Middlesex Sittings after Trinity Term, the plaintiff had a verdict for one farthing damages, and the lord chief baron certified under the 43 Eliz. c. 6, for the purpose of depriving him of costs.

On a former day in this term, *Humfrey* obtained a rule to shew cause why the Master should not tax the plaintiff his costs notwithstanding the certificate, on the ground that a battery was admitted on the record.

Bompas, Serjt., and *Hoggins* shewed cause.—The declaration does not state a battery. The seizing and laying hold of a party, which may be merely the taking hold of his coat, does not necessarily constitute a battery, which imports a *beating*. Mere contact is not sufficient. In *Emmett v. Lyne* (a), where the plaintiff declared for an assault, battery, and imprisonment, and proved no battery, but proved an imprisonment, and the damages being under 40s. the judge certified under the 43 Eliz., it was contended for the plaintiff, that every imprisonment included a bat-

(a) 1 N. R. 255.

tery; but the Court denied the proposition, and said that all which the authorities established was, that imprisonment was a "corporal damage" (a). A touch given by a constable's staff does not constitute a battery: *Wiffin v. Kincard* (b). [Parke, B.—There the touch was merely to engage the plaintiff's attention, not to put a restraint on his person.] In Comyn's Digest, *Battery, A.*, it is laid down that it is a battery, "if he comes in aid of an officer who has a warrant against A., and lays his hand upon A., and says to the officer, This is the man! R. 2 Rol. 546, l. 7." In *Daubney v. Cooper* (c), which was trespass for assaulting and beating the plaintiff, and turning him out of a room, whereby he was prevented from exercising the business of an attorney there, it was held, that upon a verdict for 1s. on not guilty pleaded, the plaintiff was entitled to no more costs than damages. [Parke, B.—There there was no imprisonment at all, and the plaintiff was not entitled to more costs than damages, unless the judge certified under the 22 & 23 Car. 2, c. 9, that a battery was proved. Alderson, B.—In *Wiffin v. Kincard, Chambre, J.*, says that imposition of hands, in order to imprison, is a battery. If it were otherwise, how could you justify a battery by *molliter manus imposuit*?]

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Humfrey, contra, was stopped by the Court.

PARKE, B.—The question is, whether, in order to prove his averment that the defendant "seized and laid hold of him, &c." the plaintiff must not prove an *adverse* laying hold of him, on the general issue: if so, then I think that is a battery. An *imprisonment* may take place without touching the person at all. Then there is no doubt that the special plea admits all that it was necessary to prove, in order to sustain the averments in the declara-

(a) Co. Litt. 253; Bull. N. P. 22.

(b) 2 N. R. 471.

(c) 10 B. & C. 830.

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tion on the general issue. This plea, therefore, admits such a seizing and laying hold of the plaintiff as were necessary to restrain him.

The other Barons concurred.

Rule absolute.

HULME and Another, Assignees of JOHN SMITH, v.
MUGGLESTON.

*Assumpsit by assignees of one S., a bankrupt, for money had and received to the use of the assignees since the bankruptcy. Plea, that before the bankruptcy, and before notice of any act of bankruptcy, the defendant gave credit to the bankrupt to the amount of 50*l.*, by indorsing for his accommodation, and without consideration, a bill of exchange for that amount, drawn by him, and payable*

INDEBITATUS ASSUMPSIT.—The first count was for money had and received to the use of the bankrupt, J. Smith, before he became bankrupt, and the second count for money had and received by the defendant to the use of the plaintiffs as assignees, since the bankruptcy. To the latter count the defendant pleaded, fourthly—As to so much of that count as related to the sum of 97*l.* 10*s.*, parcel, &c. in that count mentioned, that long before he, the defendant, had notice that any act of bankruptcy had been committed by the said J. Smith, and long before any fiat of bankruptcy issued against the said J. Smith, and before the commencement of this action, to wit, on &c., the defendant gave credit to the said J. Smith to the amount of 50*l.*, by indorsing, for the accommodation of the said John Smith, and at his request, and without any to the bankrupt's order, and that such credit was of a nature extremely likely to end in a debt. The plea then alleged that the amount of the bill was paid by the defendant on its dishonour, after the bankruptcy, but before the commencement of the action, and the bankrupt thereupon became indebted to the defendant; that before the bankruptcy S. drew a bill of exchange on the Chesterfield Bank, and delivered it to the defendant, by way of loan, that he might raise the amount, and thereby gave credit to the defendant to that amount; and that afterwards, before the bankruptcy, the defendant obtained the amount of the said bill from the Chesterfield Bank, and that he was ready and willing to set off the two sums against each other. Replication, that the defendant did not give credit to S., and that S. did not give credit to the defendant, and that S. was not nor is indebted to the defendant *modo et forma*.

Held, that the plea shewed such a giving of credit to the bankrupt within the statute 6 Geo. 4, c. 16, s. 50, as might be the subject of set-off in an action brought by his assignees.

Semble, that the replication was bad for duplicity, as putting in issue not only the amount of the credits, &c., but also the nature of the mutual claims.

consideration paid or given to him, the defendant, for so doing, a certain bill of exchange, drawn by the said Smith upon Melhuish & Company, for 50*l.*, and payable to the order of the said J. Smith, which said bill the said J. Smith afterwards, and before any notice to the defendant of his said bankruptcy, to wit, on, &c., negotiated and transferred for value. And the defendant further says, that afterwards, and long before the defendant had any notice that any act of bankruptcy had been committed by the said J. Smith, and before the date or issuing of any fiat of bankruptcy against the said J. Smith, and also long before the commencement of this action, to wit, on &c., the defendant gave credit to the said J. Smith in and to a certain other large amount, to wit, 50*l.*, by discounting for the said J. Smith, at his request, a certain other bill of exchange, drawn by the said J. Smith on Melhuish & Co. for 50*l.*, payable to the order of the said J. Smith, and indorsed by the said J. Smith, which said bill the defendant afterwards, and before any notice to him of the bankruptcy of the said J. Smith, indorsed, negotiated, and transferred for value. And the defendant says, that the said credits so respectively given by him to the said J. Smith as aforesaid, were credits of a nature extremely likely to end in debts from the said J. Smith to the defendant, and amounting together to a large sum, to wit, the sum of 100*l.* And the defendant further says, that afterwards, and before the commencement of this suit, to wit, on, &c., the defendant was called upon and obliged to pay and satisfy the two bills of exchange above mentioned, to certain persons being respectively the holders thereof, in consequence of the said bills having been dishonoured by the acceptors thereof respectively when they became due, of which the defendant had due notice. And thereupon, and before the commencement of this action, the said J. Smith became, and at the time of the commencement of this action was, and still is, indebted to the defendant in a large sum of money, to wit, the sum of 100*l.*, being the

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amount of the last-mentioned bills of exchange, for money paid by the defendant for the use of the said J. Smith at his request, which said last-mentioned sum of money is the same identical sum in and for the amount of which the defendant had given credit to the said J. Smith as aforesaid. And the defendant further says, that before the bankruptcy of the said J. Smith, and also before the commencement of this action, to wit, on, &c., he, the said J. Smith, drew his bill of exchange in writing, and directed the same to the Chesterfield Banking Company, and thereby ordered the Chesterfield Banking Company to pay to himself or bearer the sum of 97*l.* 10*s.*, and the said J. Smith, then and before the bankruptcy of him the said J. Smith, delivered the same to the defendant by way of loan, in order that the defendant might receive the amount of the same, and thereby then gave credit to the said defendant to and in the amount of the same, and the defendant afterwards, before the bankruptcy of the said J. Smith, and also before the commencement of this action, to wit, on, &c., presented the said last-mentioned bill of exchange for payment to the said drawers thereof, and the defendant afterwards, and after the bankruptcy of the said J. Smith, but before the commencement of this action, to wit, on, &c., received from the said drawers of the said bill of exchange the said sum of 97*l.* 10*s.*, being the amount of the said last-mentioned bill of exchange, which said sum of 97*l.* 10*s.*, so received by the defendant, is the same sum of 97*l.* 10*s.* in the introductory part of this plea and in the second count of the declaration mentioned, and the damages sustained by the plaintiffs by reason of the non-performance of the premises by the defendant in respect thereof; and out of which said sum of 100*l.* the defendant is ready and willing and hereby offers to set off and allow to the said plaintiffs the full amount of the said damages, according to the form of the statute in such case made and provided.

The defendant also pleaded, fifthly, as to so much of the second count of the said declaration as relates to the sum of 19*l.* 19*s.*, parcel of the monies in that count mentioned, that the said J. Smith, before and at the time of his bankruptcy, to wit, on &c., was and ever since has been and still is indebted to the defendant in a large sum of money, to wit, the sum of 20*l.*, for goods before then sold and delivered by the said defendants to the said J. Smith at his request; and for money found to be due from the said J. Smith to the defendant, on an account before then stated between them. And the defendant further saith, that afterwards and before the bankruptcy of the said J. Smith, and also before the commencement of this action, to wit, on &c., the said J. Smith made his bill of exchange in writing, and directed the same to the Chesterfield Banking Company, and thereby ordered the Chesterfield Banking Company to pay to the said J. Smith, or bearer, a much larger sum than the said sum of 20*l.* so due and owing from the said J. Smith to the defendant as aforesaid, to wit, the sum of 97*l.* 10*s.*, and delivered the same to the defendant by way of loan, in order that the said defendant might receive the amount of the same, and thereby then gave credit to the defendant to the amount of the same: and the defendant afterwards, and at the bankruptcy of the said J. Smith, to wit, on &c., received the sum of 19*l.* 19*s.*, part of the amount of the last-mentioned bill, from the drawers thereof, which said sum of 19*l.* 19*s.* so received by the defendant as last aforesaid is the same sum of 19*l.* 19*s.* in the introductory part of this plea, and in the second count of the said declaration mentioned; and the defendant says, that the said sum of 20*l.* so due and owing from the said J. Smith to the defendant as aforesaid exceeds the damages sustained by the plaintiffs as such assignees as aforesaid, by reason of the nonperformance by the defendant of his the defendant's promises as to the

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said sum of 19*l.* 19*s.* in the introductory part of this plea mentioned: and the defendant is ready and willing, and hereby offers to set-off and allow to the said plaintiffs the full amount of the said last-mentioned damages out of the said sum of 20*l.* due and owing to the defendant as aforesaid, according to the form of the statute in that case made and provided.

Replication to the fourth and fifth pleas, that the defendant did not give credit to the said J. Smith, and that the said J. Smith did not give credit to the defendant, and that the said J. Smith was not nor is indebted to the defendant *modo et formâ*.

Special demurrer to the replication to the fourth and fifth pleas assigning for causes, that the replication is double and bad for duplicity in this, to wit, that the plaintiffs have endeavoured to put in issue several distinct points, namely, the credit given by the defendant to the said J. Smith, and the debt due from the said J. Smith to the defendant, and also the credit given by the said J. Smith to the defendant, by traversing either of which the plea would have been answered; and for that the said replication is multifarious, and the plaintiffs have endeavoured, by means of it, to put the same matters in issue which would have been put in issue by a replication of *de injuriâ*, which replication of *de injuriâ* would have been bad had they made use of it. And for that the plaintiffs, if they had a right to traverse all the several matters contained in the plea in one and the same replication, ought to have traversed them by a replication of *de injuriâ*, that being the form appointed by the law in such a case. And further, for that the plaintiffs have in their said replication traversed matter not traversable, and have taken issue upon a mere allegation, inference, and question of law, namely, on the question whether the facts stated in the said fourth plea amount to mutual credits within the meaning of the statute in such case made and provided.

The points stated for argument on the part of the plaintiffs were, that the objections taken by the demurrers are not fatal, and that the fourth and last pleas are bad, on the ground that they do not shew a mutual credit, debt, or demand within the meaning of the 50th section of the Bankrupt Act.

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J. W. Smith, in support of the demurrer. The replication is bad for duplicity. It is not a traverse of several distinct facts, all forming or tending to one point of defence, as in *Selby v. Bardons* (a); but it puts in issue several distinct matters, one of which would be a sufficient answer to the pleas. It is not sufficient, moreover, that the several facts should only make up one point of defence, but the facts must be so connected in point of time and circumstance, as to be mutually dependent on each other, and form but one issue for the consideration of the jury. Here the replication puts in issue, not only the credits given, but the being indebted also. It traverses both sides of the account, and the nature of the mutual claims. It was necessary for the defendant to state in this plea, not only the credit given, but that the claim was of such a nature that he was entitled to set it off against the claim of the plaintiffs. Then the plaintiff has put in issue, not only the nature of the claim, but its amount also. Besides, the monies mutually claimed must have been the subject of two distinct actions; the plaintiff by his replication has therefore put in issue two distinct subject matters of actions. It would be a great hardship on the defendant, if the plaintiff were allowed so to raise independent issues; since, in that case, he would be compelled on the trial to prove the draft on the Chesterfield Bank, which is part of the plaintiff's claim. There are many authorities which go much further than the present case. In

(a) 3 B. & Adol. 2; S. C. in error, 1 Cr. & M. 500.

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Faulkner v. Chevell (a), where, to a declaration in debt on the stat. 22 Geo. 2, c. 46, s. 14, charging the defendant, that he, being Deputy Clerk of the Peace, practised at the Sessions as an attorney, the defendant pleaded that he was not, at any of the times when, &c. deputy clerk of the peace, nor did he commit any of the said supposed offences in manner and form &c., the plea was held to be bad for duplicity. So, in *White v. Reeves* (b), a rejoinder to a replication in trespass for stopping up a private way under an Inclosure Act, which alleged that the commissioners did not direct the way to be stopped up, nor give any orders relating to the same, nor by his award set out any other way in lieu of it, was held bad for duplicity. The rejoinder in that case was not more double than the replication is in the present. In *Regil v. Green* (c), the replication was held bad for tendering issues on several matters, having, by the first allegation, put in issue the whole substantial matter of defence, whereby the other issues became immaterial. The instances in which several distinct facts, all tending to one point of defence, can be put in issue by one traverse, are almost all those of a replication de injuriâ, where the matter pleaded has been matter in excuse only. Thus, in *Griffin v. Yates* (d), it was held that de injuriâ is a proper replication in assumpsit, where the plea consists of matter of excuse. It cannot be denied, on the authorities, that where the plea consists of several facts, all constituting but one point of defence, a party may take issue on it by the general replication de injuriâ: but it is not sufficient that the point of defence is capable of being comprised in a short form of words; the principle is, that there shall be only one issue for the jury. In *Webb v. Weatherby* (e), on a plea of payment of

(a) 5 Ad. & Ell. 213.

(b) 2 B. Moore, 23.

(c) 1 M. & W. 328.

(d) 2 Bing. N. C. 579.

(e) 1 Bing. N. C. 502.

3*l.* 8*s.* 2*d.* in satisfaction and discharge of the defendant's promise, a replication that the defendant did not pay it in satisfaction and discharge, nor did the plaintiff receive it in satisfaction and discharge, was held unobjectionable; but that was only because the *receipt* in satisfaction impliedly involved the *payment* in satisfaction, and therefore formed but one issue. In *O'Brien v. Saxon* (a), the replication was held good, because the petitioning creditor's debt, the trading, and act of bankruptcy, all formed but one point, namely, that the plaintiff had become bankrupt. In *Robinson v. Raley* (b), the replication traversed that "the cattle were the plaintiff's own cattle, and that they were levant and couchant upon the premises, and commonable cattle;" that however put in issue only the qualities of the cattle, which they must possess at one and the same time: it did not involve two distinct issues, but one only, namely, whether the cattle were entitled to common. Lord *Mansfield* there says: "You must take issue upon a single point; but it is not necessary that this single point should consist of a single fact. Here the point is, the cattle being entitled to common: that is the single point of the defence. But, in fact, they must be both his own cattle, and also levant and couchant, which are two different, essential circumstances of their being entitled to common." This point was very much discussed in the case of *Selby v. Bardons* (c), and afterwards in error in *Bardons v. Selby* (d). In *Faulkner v. Chevell*, Lord *Denman*, C. J., in delivering the judgment of the Court, says:—"We think this plea is bad, as containing *two independent defences*;" and that is the true ground, for two independent defences cannot be set up under one plea.

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Cowling, contra.—First, the plea is bad, inasmuch as it does not disclose a defence under the Bankrupt Act.

(a) 2 B. & Cr. 9.

(b) 1 Burrow, 316.

(c) 3 B. & Ad. 2.

(d) 1 Cr. & M. 500.

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The statute 6 Geo. 4, c. 16, s. 50, applies to two cases: 1st, where mutual credit has been given, whether it has or has not terminated in a debt; 2nd, where there have been mutual debts, whether with or without a prior credit.

In these cases respectively, there must not have been notice of an act of bankruptcy at the time of giving the credit or contracting the debt. Here the defendant cannot rely on the latter branch, because there is no averment of want of notice at the time of payment; nor, as it is contended, can he on the former, because there is no mutual credit within the meaning of the statute. 'Credit' means such as will in its nature end in a debt; *Clarke v. Fell* (a), and the cases there cited. But the indorsing a bill for the accommodation of another, is not a giving credit to him, but an enabling him to pledge the indorser's credit to another, and will not naturally terminate in a debt, for the other ought to provide the indorser with funds to take it up. The phrase in the plea, that it was "of a nature extremely likely to end in a debt," is unavailing, for it is not a question for the jury. The credit given was at most a credit on a contingency. In *Glennie v. Edmunds* (b), it was held, that where a person who had insured with the defendant became bankrupt, and was at the time indebted to the defendant for premiums, the defendant could not set off those premiums against an action by the assignees for the amount of a loss which subsequently occurred. There the credit was at least as much of a nature ending in a debt as in the present case. Section 51 shews instances of credits, and they ought to be confined to cases of a similar nature. In fact, to allow the set-off would place accommodation-indorsers in the same position as ordinary indorsers for value, since the set-off might be made before the defendant had paid the money; for it is the mutual 'credit,' not 'debt,' which in the present instance constitutes

(a) 4 B. & Ad. 404; 1 Nev. & M. 244.

(b) 4 Taunt. 775.

the defence. This is, therefore, a case where the only mutual credit within the meaning of the clause is that which arises on payment of the money by the defendant; and which must be taken to be after notice of the bankruptcy. [*Parke, B.*—Could not the defendant prove the money paid?] Certainly; but the language of sections 50 and 52 is very different; one relates to being surety, the other to giving credit, and does not merely state that all demands proveable may be set off, but adds the proviso respecting want of notice of an act of bankruptcy at the time of giving the credit, which would be superfluous, if every thing proveable could be set off. Indeed, if a set off be allowable here, it would have been so even under the 5 Geo. 2, c. 30, for the 28th section of that statute is similar to that in the present statute; and yet it was not until the 46 Geo. 3, c. 135, that such a demand as the defendant's could even be proved; the third section of that statute was expressly inserted in order to enable such proof to be made; see Lord *Ellen's* judgment in *Ex parte Yonge* (a), the correctness of which is shewn by *Snaithe v. Gale* (b). It would, however, be singular if a person should have been allowed to set off and thereby obtain payment of the whole of his debt, and not be able to prove, so as to claim even a dividend. In *Carter v. Breton* (c), which was fully argued, a right of set off was not even contended for, though it was a clearer case than the present in favour of it, and the judgment was against the defendant. [*Parke, B.*—Are not *Smith v. Hodson* (d), *Ex parte Boyle* (e), and *Ex parte Wagstaff* (f), in point?] In *Smith v. Hodson*, the bankrupt disposed of the goods prior to his bankruptcy, by way of fraudulent preference, in payment of a demand of the defendant; but the assignees, by bringing assumption for the price of the goods, were held to have affirmed

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(a) 3 V. & B. 31, 40.

(b) 7 T. R. 364.

(c) 6 Bing. 621; 4 M. & P. 424.

(d) 4 T. R. 211.

(e) Cooke, B. L. 542.

(f) 13 Ves. 65.

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the contract in toto; and the decision therefore would have been the same, if there had been no clause respecting set off in the statute. Indeed, the Court admitted, that if trover had been brought the assignees might have recovered, and then the set-off would have been disallowed. *Ex parte Boyle* was decided when the meaning of the term 'credit' was not settled, and when every kind of trust was considered as a credit; and is a decision which does not appear to have been ever acted upon. *Ex parte Wagstaff* merely shews that the debt need not be due at the time of the bankruptcy. (He then argued as to the sufficiency of the replication; but, on the recommendation of the Court, he prayed leave to amend on payment of costs). As to the plea,

The COURT said—We entertain no doubt as to the sufficiency of the plea. It is well established by many cases, that the credit given as there stated is a good subject of set off; and the cases which have decided that only such transactions may be set off as would necessarily end in debts, are quite reconcileable with those cases where it has been held that accommodation-acceptances may be set off.

Leave to amend the replication on
payment of costs.

BLESSLEY v. SLOMAN.

The defendant,
a sheriff's
officer, arrested
the plaintiff at
the suit both
of A. and B.

TRESPASS for assault and false imprisonment. Pleas, first, not guilty; secondly, a justification under a writ of *capias* against the plaintiff at the suit of T. E. Price. New

The plaintiff gave a bail-bond in the action at suit of A., and also signed a paper, purporting to be a bail-bond in the other action, which however was not a perfect instrument, but the defendant received from him the fees as upon a bail-bond. It did not appear which was executed first, and the plaintiff was immediately afterwards discharged:—*Held*, that the officer was not liable in trespass, although it appeared that, an hour before the plaintiff's discharge, B. had informed the defendant that his debt was satisfied.

assignment to the latter plea, that the defendant assaulted and imprisoned the plaintiff on other and different occasions, and for other and different purposes, than in the plea alleged; to which the defendant pleaded, first, not guilty, and secondly, a justification under a writ of *capias* against the plaintiff, at the suit of C. Lewis. To the latter plea the plaintiff replied *de injuriâ*.

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At the trial before Lord *Abinger*, C. B., at the Middlesex Sittings after last term, it appeared that the defendant, who was an officer of the sheriff of Middlesex, arrested the plaintiff at the suit both of Price and of Lewis; and the plaintiff gave a regular bail-bond in the action at the suit of Price. The defendant also received from the plaintiff the fees as upon a bail-bond in the action at the suit of Lewis; but the instrument signed by the plaintiff was in fact not sealed, and the blanks were not filled up. The plaintiff signed the one bail-bond immediately after the other, and was then liberated. The plaintiff's counsel proposed to call Lewis, to prove that an hour before the plaintiff was discharged he, Lewis, had communicated to the defendant that his debt was paid; the learned judge was however of opinion, that even if that were the case, as the defendant did not detain the plaintiff longer than he had a right to do at the suit of Price, he was not liable to an action of trespass, and accordingly directed a nonsuit.

Jervis now moved for a new trial, on the ground of misdirection. Even assuming that the defendant did not detain the plaintiff longer than he might lawfully do at the suit of Price, yet as he alleges, in his plea to the new assignment, a right to detain him at the suit of Lewis also, he is liable in this action. Suppose a defendant is in prison at the suit of A., and B. lodges a detainer against him in a false suit—as against B. it is a false imprisonment. It made the defendant a trespasser *ab initio*, when, after Lewis's communication, he came back and alleged a

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writ against the plaintiff at Lewis's suit, and made use of it as an instrument of extortion. It was, therefore, an unlawful detainer for that hour. But there was at all events necessarily a further detainer, for however short a time, while the defendant compelled the plaintiff to sign the second paper. [Lord *Abinger*, C. B.—It did not appear which was executed first.] Every detention is *prima facie* a trespass; and it was for the defendant to prove a valid writ at the suit of Lewis.

LORD ABINGER, C. B.—There was no evidence that the plaintiff was detained a moment longer than the defendant was justified in detaining him under a lawful writ.

PARKE, B.—I think the nonsuit was right. The general issue to the new assignment covers the whole time for which the plaintiff was in custody; the special plea covers the time at which he was in custody at the suit of Price. He does not make out that he was detained an instant longer than the defendant was justified in detaining him under Price's writ. The result of that is, that under the general issue the defendant is entitled to a verdict. It comes to the same thing that the plaintiff is nonsuited.

ALDERSON, B.—I am of the same opinion. If the officer, by a false statement as to the detainer which he has received, prevents the party from obtaining his discharge from the lawful arrest, that may make him a trespasser; but that is not the case here.

GURNEY, B., concurred.

Rule refused.

Each. of Pleas,
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TURNER v. CROSSLEY.

DEBT, in the sum of 6*l.*, for goods sold and delivered, and in 6*l.* on an account stated. Pleas, first, as to all the sums demanded, except the sum of 5*l.* 16*s.* 10*d.*, parcel &c. nunquam indebitatus; secondly, as to the sum of 1*l.* 14*s.* 8*d.*, parcel of the said sum of 5*l.* 16*s.* 10*d.*, a set-off; thirdly, as to the residue, *i. e.* the sum of 4*l.* 2*s.* 2*d.*, that the plaintiff ought not *further* to maintain his action in respect thereof, because the defendant says, that when the same became due, he was and has ever since been ready to pay the same; and that after it became due he was ready to tender, and offered to tender the same, but that the defendant dispensed with an actual tender thereof, because the matter was in the hands of his attorney; and that the defendant now brings the said sum of 4*l.* 2*s.* 2*d.* into Court, ready to be paid to the plaintiff, &c. &c. The plaintiff thereupon took the 4*l.* 2*s.* 2*d.* out of Court, and entered a nolle prosequi as to that sum; and on the trial before Lord Abinger, C. B., at the Middlesex sittings after last term, the defendant had a verdict on the other issues.

Jervis now moved for a rule to shew cause why judgment should not be entered up for the plaintiff on the whole record, and contended that the third plea was an informal plea of payment of money into Court, and not a plea of tender; upon which, therefore, the plaintiff was entitled to the costs of the cause. It was held in *Finch v. Brook* (a), that a finding, that the defendant's attorney called on the plaintiff, and said, "I am come to pay you the 1*l.* 12*s.* 5*d.* which the defendant owes you," to which the plaintiff said,

Debt for goods sold, &c. Pleas, as to all the sum demanded, except 5*l.* 16*s.* 10*d.*, nunquam indebitatus; as to 1*l.* 14*s.* 8*d.*, parcel of the 5*l.* 16*s.* 10*d.*, a set-off; as to the residue, *i. e.* 4*l.* 2*s.* 2*d.*, that the plaintiff ought not *further* to maintain his action, because the defendant, when the same became due, was and has ever since been ready to pay the same; and that after it became due he was ready to tender, and offered to tender the same, but the plaintiff dispensed with an actual tender, because the matter was in the hands of his attorney; and the defendant brings the money into Court, ready to be paid to the plaintiff, &c. :—*Held*, that this was an informal plea of tender, not a plea of payment into Court; and the plaintiff having taken the money

out of Court, and entered a nolle prosequi, the defendant, who had succeeded on the other issues, was entitled to judgment on the whole record.

(a) 1 Bing. N. C. 253; 1 Scott, 70.

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"I cannot take it, the matter is in the hands of my attorney,"—did not warrant a judgment for the defendant. [*Parke, B.*—This plea goes further; it states that the plaintiff dispensed with an actual tender.] The plea is not pleaded in bar of the action altogether, as a plea of tender ought to be, but only in bar of the further maintenance of the action.

PARKE, B.—The question is, whether this is an informal plea of tender, or an informal plea of payment of money into Court. The whole difficulty arises from the insertion of the word "further" in the plea: but can there be any doubt that it is meant to be a plea of tender, and that that word crept in by mistake? I think there should be no rule.

The rest of the Court concurred.

Rule refused.

WRIGHT v. LAINSON and Another.

In an action against the sheriff for a false return of nulla bona to a *fi. fa.*, the defence being the bankruptcy of the debtor, the Court refused to allow the defendant to plead together two pleas, one traversing the allegation that the defendant seized the goods of the debtor, and the other setting forth the dates, &c. of the act of bankruptcy and fiat; the former having been prior, the latter subsequent, to the seizure.

IN this case (reported ante, Vol. 2, p. 739) *Butt* applied for leave to add two pleas, the one traversing the averment in the declaration that the defendants seized the goods of Hayes (the bankrupt), and the other also stating the circumstances and dates of the act of bankruptcy, and of the issuing of the fiat. The act of bankruptcy was before the seizure, although the fiat did not issue till after it; and there might be some question whether the former plea alone would sufficiently raise the defence, since it might be said that the goods were the goods of Hayes at the time of the seizure, notwithstanding the prior act of bankruptcy, inasmuch as the fiat had not then issued.

Lord ABINGER, C. B.—They were at that time the goods of the assignees by relation to the time when the act of bankruptcy was committed, although the fiat was not issued until afterwards. It is quite clear that to prove the shorter plea, you must prove the trading, the petitioning creditor's debt, and an act of bankruptcy before the date of the levy.

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ALDERSON, B.—To allow these pleas together would be introducing all the evil of double pleading, which it was the object of the rules to avoid. You may take which of them you choose.

Motion refused.

DRURY v. DAVENPORT.

WIGHTMAN shewed cause against a rule which had been obtained for setting aside a copy of a writ of summons, on the ground that it commenced "William the Fourth, &c." instead of "Victoria," although dated and served in the present reign. He urged, that inasmuch as the writ was tested in the name of the proper Judge, and had the proper date, the defendant could not be misled by the error in the name, and it was therefore immaterial: *Elvin v. Drummond* (a). [Parke, B.—That case was before the late statute, which gives a precise form.] The form itself runs in the name of William the Fourth. The statute, however, did not alter the law or practice as to these matters from what they were before.

A writ of summons, commencing "William the Fourth, &c.," instead of "Victoria," is irregular, and will be set aside on motion.

PARKE, B.—We are now under a statute giving an express form, and we have always held it necessary that it should be strictly pursued. The rule must be absolute with costs.

Rule absolute.

(a) 4 Bing. 278; 1 Moo. & P. 88.

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SIBONI *v.* KIRKMAN and Another.

The omission of a similiter is amendable under the Statute of Amendments, 8 Hen. 6, c. 12, s. 2, as misprision of the clerk, even after final judgment, and after a writ of error has been brought, and such omission assigned for error.

THE writ of error in this case having been proceeded with (a), several errors were assigned, one of which was, that no issue was joined on the second plea; the defendant not having added the similiter to the replication, and there being no &c. to supply its place.

Martin had obtained a rule to shew cause why the record should not now be amended by adding the similiter, against which

Kelly and *Hoggins* shewed cause.—This application is too late. The case is not within the statute of Jeofails, 32 H. 8, c. 30; that applies to cases of *defective* joinder of issue; where there is an actual joinder, but some mere misprision. In *Cooper v. Spencer* (b), the want of a similiter was held, on motion in arrest of judgment, to be a fatal objection, and not amendable. A fortiori, it cannot be amendable after final judgment, and after a writ of error brought. In *Sayer v. Pocock* (c), the record was amended after verdict by instead the similiter *instead of an &c.*; but that was on the express ground that, according to Lord Coke (d), &c. would be construed to mean every necessary matter that ought to be expressed. In *Griffith v. Crockford* (e), the omission of the similiter was again held to be an irregularity for which the Court would set aside the verdict. In *Green v. Miller* (f), it was expressly held that, after error brought, the Court could amend the record only in respect of misprision of the clerk. *Stockdale v. Chapman* (g) will probably be cited on the other side. There the Court held, referring to 2 Saund. 319. a,

(a) See 1 M. & W. 423.

(b) 1 Stra. 641; 8 Mod. 376.

(c) Cowp. 407.

(d) Co. Litt. 17. b.

(e) 3 Brod. & B. 1; 6 Moore, 51.

(f) 2 B. & Ad. 781.

(g) 4 Ad. & E. 419.

note (b), that after verdict for the plaintiff, the defendant could not take advantage of the want of a similiter or an &c. to a replication de injuriâ. That, however, was not after error brought.

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Martin, in support of the rule.—With regard to the cases relied on by the other side, *Cooper v. Spencer* was expressly overruled, by name, in *Harvey v. Peake* (a). *Griffith v. Crockford* appears, from the report in Moore, to have proceeded on the special ground that the attorney had been applied to to make the amendment before the trial, and had refused: that case, however, was cited in *Stockdale v. Chapman*, and must be taken to have been thereby overruled. It is laid down in all the books that such a defect is aidable after verdict, by the statute of Amendments, 8 Hen. 6, c. 12; the statutes of Jeofails do not apply to the case. 2 Archb. Pr. 951; Tidd's Pr. 904; 2 Saund. 319, a. note (6). The 8 Hen. 6, c. 12, s. 2, enacts, that the Judges shall have power to examine records, processes, &c., "and to reform and amend, in affirmance of the judgments of such records and processes, all that which to them in their discretion seemeth to be misprision of the clerks in such record," &c. There is no reference to any previous entry by which the amendment is to be made. In *Sayer v. Pocock*, Lord Mansfield puts the judgment of the Court on three grounds: first, that it was an omission of the clerk; secondly, the effect of the &c.; and lastly, that by amending, the Court only made that right which the defendant himself understood to be so by going down to trial. The last reason strongly applies to the present case, in which the omission was that of the defendant himself, not of the plaintiff. [*Parke, B.*—The only difficulty is to see how to make out the *misprision*—to make the misprision appear, must not some document

(a) 3 Burr. 1793.

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exist which the clerk must appear to have made a mistake in copying?] Lord *Mansfield's* last reason is independent of that difficulty. In *Grundy v. Mell* (a), a similar amendment was made after verdict, on the authority of *Sayer v. Pocock*; that however was before final judgment. In *Reeder v. Bloom* (b), there was an &c., but it was not referred to by the Court; and *Gaselee, J.*, said, that according to 2 Saund. 319, a, the defect was one which might be remedied *at any time*. But *Wright v. Horton* (c) is the strongest possible authority in favour of this amendment. In that case, which was a *qui tam* action, the Court held that the entry of the *similiter*, on *nil debet*, in the defendant's name instead of the plaintiff's, was amendable after verdict; and Lord *Ellenborough* expressly recognized the last reason given for the amendment by Lord *Mansfield* in *Harvey v. Peake*. [He was then stopped by the Court].

PARKE, B.—All that the Court wanted was an authority for saying that this could be considered as a misprision of the clerk. The cases of *Wright v. Horton*, and *Stockdale v. Chapman*, are such authorities: in both the Court appear to have considered that they had power to amend such a defect as misprision, without thinking it necessary that there should be any warrant or authority for the amendment, by the production of any document to amend by: that, on the parties going down to trial, the clerk ought to make up the *nisi prius* record by inserting the *similiter*, although it has been omitted by the party. There being then such authorities, the Court is justified in directing this amendment.

BOLLAND, ALDERSON, and GURNEY, Bs. concurred.

Rule absolute on payment of costs.

(a) 1 N. R. 28.

(b) 2 Bingh. 384.

(c) 6 M. & Selw. 50.

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HAMILTON and Others v. SHEDDON.

ASSUMPSIT on a policy of insurance on goods, by the ship Clipper, at and from Liverpool to any port or ports, place or places of loading and trade, on the coast of Africa and African islands, during her stay and trade on the said coast and islands, and at and from thence to her port or ports of discharging in the United Kingdom, with leave to call at all ports and places, backwards and forwards, and forwards and backwards, in any order, for any purpose, *without being deemed any deviation*; and with liberty also for the said ship, in that voyage, to proceed and sail to, and touch and stay at, any ports or places whatsoever, and to load, unload, re-load, sell, barter, and exchange goods and property, wheresoever she might call or proceed to, with any ships, boats, factories, and canoes, in loading and unloading included; *particularly with liberty of transship* on board any vessel or craft in the same employ or otherwise, and to receive from them fresh goods, and sell, barter, and exchange those goods for fresh cargo or cargoes of produce, without prejudice to that insurance. And by a memorandum thereunder written, it was especially agreed *that the said vessel might be employed or used as a tender to any other vessel or ship in the same employ*. The declaration then stated the sailing of the vessel from Liverpool, her arrival on the coast of Africa, and her departure from thence on her homeward voyage, when she struck upon some rocks, whereby

Assumpsit on a policy of insurance on the goods of a vessel called the Clipper, at and from Liverpool to any port or ports, place or places of loading and trade on the Coast of Africa and African Islands, during her stay and trade on the said coast and islands, and at and from thence to her port or ports of discharging in the United Kingdom, with leave to call at all ports and places backwards and forwards, and forwards and backwards, *without being deemed any deviation*; with liberty for the said ship in that voyage to proceed and sail to and stay at any ports or places whatsoever, and with leave to load, unload, &c., goods wheresoever

she might proceed to, with any ships, boats, &c., in loading and unloading included, *particularly with liberty to tranship* on board any vessel or craft in the same employ; with an agreement that the vessel might be employed or used as a *tender* to any other vessel or ship in the same employ. The vessel arrived at Benin, in Africa, and stayed there thirteen months, during which time she was employed in conveying goods from a vessel in the same employ at the mouth of the river, to Camaroones, and putting them on board another vessel also in the same employ; but on her return with a homeward cargo was lost:—*Held*, that the learned Judge who tried the cause was right in telling the jury that the voyage to the Camaroones was a deviation, and that it was not an acting as a tender within the meaning of the policy:—*Held*, also, that it was a proper question for the jury, whether her stay at Benin was unreasonable or no; and they having found in the affirmative, that it was warranted by the evidence.

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the goods on board became and were wholly lost to the plaintiffs. There were also counts for money had and received, and on an account stated. The 3rd and 4th pleas only became material. The former stated, that after the arrival of the ship at the place of loading, on the coast of Africa, to wit, at Benin, and before the said homeward cargo was lost, the said ship, without any sufficient cause or excuse, did not proceed on the voyage in the policy mentioned, but deviated, departed from, and abandoned the course of the said voyage, whereby the policy, and the risk thereby insured against, became and were wholly avoided and determined. The 4th plea alleged, that the ship, after she had set sail from Benin, and before the loss, was employed and used on other and different occasions, and for other and different purposes, than those in the policy mentioned, and was also voluntarily kept, delayed, and detained at divers ports and places, for the space of thirteen months, the same being a much longer time than was necessary or reasonable for any of the purposes in the policy mentioned, whereby the risks were greatly and unnecessarily varied and increased, and the policy became and was wholly avoided and determined. The plaintiff took issue upon these pleas, and the cause was tried before *Coltman, J.*, at the last summer assizes for Liverpool, when it appeared in evidence, that the plaintiffs were merchants residing at Liverpool, having several vessels employed in the African trade. The policy was effected on the 17th March, 1835, and the Clipper, the vessel in question, sailed in May from Liverpool for Benin, where she arrived on the 25th June, 1835, and discharged her cargo at a factory of the plaintiffs, in the river there. While lying in the Benin river, the vessel acted as tender to four other vessels of the plaintiffs. Whilst thus employed, the Laurel, one of these vessels, struck on a bar at the mouth of the river Benin, in consequence of which her cargo of oil was unshipped, and put

on board the Clipper, which conveyed it, together with some other oil taken in elsewhere, to Camaroones, and there put it on board another vessel of the plaintiffs, called the *Dædalus*. The Clipper then took some iron goods on board at Camaroones, for her homeward voyage, and on the 10th of August, 1836, left that place for the island of Corisco. On the 30th, she struck upon a reef of rocks near that island, when the vessel was seized upon and broken up by the natives, and her cargo wholly carried away and destroyed. The learned Judge told the jury, that the carriage of the oil by the Clipper to Camaroones was, in his opinion, a clear deviation; but he left two questions to the jury: first, whether or not they thought that the vessel had been employed for other purposes than those mentioned in the policy; secondly, whether she had stayed an unreasonable time in the river Benin. The jury found both questions in the affirmative, and gave their verdict for the defendant accordingly.

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Alexander now moved for a new trial, on the ground of misdirection, and of the verdict being contrary to the evidence.—This was not a deviation, nor was the time the vessel stayed away unreasonable. The policy was expressly framed to meet such a voyage as this; and there is an express agreement that the vessel may be employed or used as a *tender* to any other vessel or ship in the same employ. The vessel in question was used as a tender to the *Dædalus* from the *Laurel*, which latter vessel, having been disabled from going forward, had unshipped her cargo into the Clipper. She was thus used as a tender to the *Dædalus*, to enable her to proceed to England. The African trade is especially a trade of barter, and this was not a distinct voyage to any particular place, but a voyage of barter to any place or places where the hopes of barter to advantage might be greatest. [*Alderson*, B.—This was a taking of the goods out of the *Laurel* as a carrier,

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and carrying them to the *Dædalus*.] All that was done was for ships in the same employ, which was within the words of this policy. The learned Judge, however, thought that going from the mouth of the Benin river to Camaroones was a deviation, and that the Clipper had been used as a *warehouse*. But unless she had been used as a warehouse, the transshipping allowed by the policy could not have been carried on.

LORD ABINGER, C. B.—I am of opinion that the learned Judge was right in his definition of a ship's tender, and that there was no misdirection in this case. I have always understood that the tender of a ship was one that was employed in assisting the loading of the ship at the port where the ship was intended to be loaded, and the Clipper might have acted in that capacity to the *Laurel* without impropriety; but when the *Laurel* got into difficulties, and the cargo was transshipped and put on shore—when the Clipper takes the cargo from Benin, and carries it on another voyage, and to another port, and puts it aboard of another ship, which is not a tender to that ship, she is doing then a totally distinct act, and cannot be considered as acting as tender to the ship there. Now that is not the meaning of this policy; she was to act as a tender between the ship and the port where that ship was stationed—not in carrying the cargo to another port. On that part of the case I think the learned Judge was right in his opinion, and that this was quite a separate and distinct transaction, and a deviation from the voyage covered by the policy. As to the other part of the case, I am not prepared to say the verdict of the jury was wrong—it was a question for them, and we cannot say they were wrong. It was a proper question for them, upon the evidence, whether the remaining out so long was within the meaning and intention of the policy; and, as there must be some limit to the underwriters' liability, whether the proper time had not been exceeded.

PAKKE, B.—I am entirely of the same opinion, and think the learned Judge was right in the direction he gave the jury on the third issue, that the act of carrying the cargo from Benin, where the Laurel got on shore, to Camaroones, was not an act of tendering within the meaning of the policy, or in the terms of its protection, but was a deviation. It appears to me that the question resolves itself into one of construction to be put on this particular clause, which refers to the liberty to be given on this voyage, and clearly does not authorize such an act as this. It is not necessary to go through the words of the policy in order to see that the voyage is to be confined to the original voyage—there is nothing that would authorize the vessel to act as carrier to any other vessel or ship in the same employ; and the simple question is, whether the carrying of this cargo to another port is an act of tender. Now, if the Laurel had been on shore, and this vessel had been sent and employed to relieve the Laurel from her cargo, and to carry it to the nearest safe place, I should have thought that would have been an act of tendering within the protection of the policy. But that is not so—it is carried to Camaroones for another purpose, quite inconsistent with and wholly independent of any assistance given in the shape of tender to another vessel, and therefore the moment the vessel sailed to Camaroones, that was a deviation in effect from the policy, and the underwriter was discharged. With respect to the question upon the other issue, it is not necessary to go into that, for, as the verdict upon the third issue must have been for the plaintiff, it would be for the plaintiff on that also; and it has been recently decided in the Court of Common Pleas, that there must be some limit put to voyages of this kind, and that they are not to be extended beyond a reasonable time.

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ALDERSON, B., and GURNEY, B., concurred.

Rule refused.

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BOOTH v. Lady HYDE PARKER.

The defendant gave a cognovit, whereby it was stipulated that no judgment should be entered up thereon, unless default should be made in payment of the debt, with interest, *and costs*, on the 9th November; and in case the defendant made default in payment as aforesaid, the plaintiff was to be at liberty to enter up judgment and proceed to execution, and take the whole of the said debt and costs, *together with the costs of such judgment and execution*:—
Held, that no default could be made by the defendant until the plaintiff had furnished her with a bill of the costs, and given her notice of taxation; and not having done so, that judgment signed on the 10th November was irregular, although the defendant had paid no part of either the debt or costs.

THE defendant in this case, on the 27th October, gave a cognovit, in which it was stipulated that no judgment should be entered up or execution issued thereon, unless default should be made in payment of the sum of 17*l.* 6*s.* 10*d.*, the amount of the debt, together with interest from that day, *and costs*, on the 9th of November: and in case the defendant made default in payment as aforesaid, the plaintiff was to be at liberty to enter up judgment and proceed to execution, and take the whole of the said debt and costs, *together with the costs of such judgment and execution*; and the defendant consented that the costs should be taxed as between attorney and client, and agreed to pay, and include in such costs, the expense attending the filing of the cognovit. The defendant not having paid any part of the debt or costs by the day mentioned in the cognovit, the plaintiff made an entry of final judgment on the judgment paper, without having previously furnished to the defendant any bill of costs, or given her any notice of taxation.

Barstow, on a former day in this term, obtained a rule to shew cause why the judgment should not be set aside for irregularity, on the ground that, inasmuch as the cognovit stipulated for payment of debt *and costs* on the 9th November, the plaintiff could not sign judgment without having a previous taxation of such costs; and cited *Wilson v. Northern (a)*. The affidavit of the plaintiff's attorney, in opposition to the rule, stated that he believed it to be the practice in such case to tax the costs once only, *viz.*, on the final judgment: and that it was the practice of attorneys for defendants, under such circum-

(a) 4 Dowl. P. C. 212.

stances, to give notice if they were ready to pay the debt. The Master however certified to the Court that there was no certain practice on the subject.

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Kelly shewed cause.—It was unnecessary, in *Wilson v. Northern*, to decide that there must be a taxation of costs before signing judgment, because there judgment was signed on the very day limited for payment of the debt. The case may be supported on that ground, and the observations of the learned judges, which are relied on for the defendant, are therefore extrajudicial. In order to determine that this judgment is irregular, the Court must say that the plaintiff could not have signed judgment and issued execution for the *debt alone*, giving up the costs, after the 9th of November. The defendant says that default must be made in payment of *all three*—debt, interest, and costs—before judgment could be signed: then it would follow that if she paid the costs, but not the debt, judgment could not be signed. The defendant is bound to discharge herself; surely she must tender and pay each as it becomes due. The taxation of the costs may be delayed from day to day; must the defendant therefore not pay the debt? If the defendant's statement of the practice be right, there must be two several taxations, and two several executions in case of default. The more convenient course is that which the plaintiff was taking—to make the entry of the judgment, then tax all the costs, and fill up the judgment, and issue execution for the whole. But further, if the judgment is not final until the whole sum is entered which the defendant is to pay, then judgment has not as yet been signed here; it is a mere incipient proceeding.

Barstow, contra, was stopped by the Court.

PARKE, B.—The rule must be absolute. With regard

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to the last objection, that judgment has not been completely signed, it is true it has not ; but the plaintiff is not entitled to commence that which is an irregular transaction, if he was precluded from doing so by the terms of this cognovit. Then the question is, whether, on the terms of the cognovit, the defendant was bound to make two tenders, one of the debt, and another of the costs when taxed. I think she was bound only to make one tender, of one entire sum, viz., the debt, and the costs of the action as between attorney and client. To enable her to do this, the plaintiff was bound to go through the form of ascertaining the costs by taxation, and to give the defendant notice of it; then if she omitted to pay either the debt or costs, the cognovit would be forfeited. No doubt the plaintiff may give up the costs; but if so, he must give the defendant notice to that effect, and then he would be entitled to judgment on default in payment of the debt.

ALDERSON, B.—I agree in the conclusion, and adhere to the reasons given for it, in the case of *Wilson v. Northern*. That case might no doubt have been decided on another ground; but it is new to me to hear that a case is no authority, although the reasons given by the judges are in point, because, though pertinent to the case, they are not *all* the reasons that might be given. I consider that case a direct authority. But independent of that authority, I think the plaintiff was not entitled to sign judgment until default in payment of the aggregate sum which consisted of debt, interest, and costs. If that aggregate sum exists, then, if the defendant makes default in paying the whole, the condition is broken. But it does not exist, because the costs are not ascertained; therefore there can be no default. If the plaintiff gives up the costs, that makes a new aggregate sum, by nonpayment of which

there is a default: but until the defendant knows what *that* aggregate sum is, she cannot make default; the plaintiff ought therefore to inform her.

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GURNEY, B. concurred.

Rule absolute, with costs.

ANGUS v. COPPARD and Others.

CLARKSON had obtained a rule to set aside the appearance and subsequent proceedings in this cause. It was an action of trespass against nine defendants, for taking forcible possession of certain houses at Horsham. The several defendants living at a considerable distance from each other, two writs of summons were taken out, on the same day, each of them including the names of all the defendants; and some of the defendants were served with one of the writs, others with the other; six of them only being served in all. For these six an appearance was entered on the 10th July, and on the same day a declaration was filed. On the 11th, one of the six defendants, Medwin, who was an attorney, took the declaration out of the office, not stating whether he took it out on behalf of the other defendants or not. On the 12th, a summons was taken out for all the six defendants to set aside the appearance, which was attended by counsel for all the defendants, who on that occasion undertook to accept short notice of trial. On the 18th, the defendant Medwin pleaded separately. The other defendants not having pleaded, on the 19th judgment was signed against them. A summons being taken out before a Judge at chambers to set aside the judgment, on the 22nd the learned Judge made an order that the case should go on to trial, without prejudice to the defendants' right afterwards to apply to

There is no irregularity in issuing several writs of summons for the same cause of action, when there are several defendants, if they are issued on the same præcipe, and dated the same day.

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the Court to set aside the appearance and subsequent proceedings. The present rule was therefore now applied for, on two grounds: first, that the service of two several writs of summons was irregular; secondly, that the affidavit of service did not state the day on which the indorsement of the time of service was made, pursuant to rule 3 of M. T. 3 W. 4. It appeared, however, on cause being shewn, that the rule was not drawn up on reading the affidavit of service, and that it was not annexed to any of the affidavits; the case was therefore argued on the first point only.

Thesiger and *Ogle* shewed cause.—Assuming that the issuing of two writs was irregular, it was waived by the taking of the declaration out of the office, or at all events by the summons of the 12th July, and the undertaking of the defendants to accept short notice of trial. [*Parke*, B. —Medwin's taking the declaration out of the office is not shewn to have been by the authority of the other defendants; and we think the undertaking to accept short notice of trial was no waiver, unless as to any informality in the notice of trial. The case is therefore reduced to the question, whether the issuing of the two writs was irregular.] It is submitted that it was no irregularity. All that the rule of Court (M. T. 3 W. 4, rule 1) requires, is, that *every* writ of summons, as well as of *capias* and *detainer*, shall contain the names of all the defendants in the action, and shall not contain the names of any defendants in more actions than one. It is clear that a defendant may issue concurrent writs of *capias*: *Christie v. Walker* (a), *Dunn v. Harding* (b).

Sir *W. Follett*, *Clarkson*, and *Tyndale*, *contra*.—This process was irregular. A different system altogether now

(a) 1 Bingham 48; 7 Moore, 362.

(b) 10 Bingham 553; 2 Dowl. P. C. 803; 4 M. & Scott, 450.

subsists from that which prevailed before the Uniformity of Process Act. The writ of summons is now the actual commencement of the action; which of these two writs is to be taken as the commencement of this suit? The issue, when made up, must recite two writs instead of one. *Dunn v. Harding* was the case of concurrent writs of capias, against the same defendant, into *different counties*, directed to different sheriffs. But concurrent writs of capias cannot be issued into the *same* county, nor, by analogy, can there be two writs of summons against the same defendants into the same county: and it is not shewn here but that all the defendants reside at Horsham, where the affidavits appear to be sworn.

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THE COURT took time to consult the officers of the other Courts upon the point; and a few days afterwards,

PARKE, B., said:—The question in this case was, whether, since the act for uniformity of process, it is an irregularity to sue out two writs of summons for the same cause of action, bearing date the same day. We took some time to consult the officers of the other Courts on the point; and they report to us that there is no irregularity in issuing two writs of summons for the same cause of action, if they are issued on the same præcipe, and dated the same day. There is a convenience in allowing two writs, because there may often be great difficulty in serving many joint defendants who reside in different counties; and it is no inconvenience to the defendant, because he will be liable to the expense of one writ only. In the case of a writ of capias, there is no doubt that there *must* be two writs, where the defendants reside in two counties. The rule must therefore be discharged, and with costs, as it is a question of irregularity.

Rule discharged, with costs.

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EAGER v. CUTHILL.

On a motion for costs of the day, a stay of proceedings cannot be had, although two days' notice of the motion be given.

GODSON having obtained a rule to shew cause why the plaintiff should not pay the costs of the day for not proceeding to trial, and why all proceedings should not be stayed in the mean time, two days' notice of this motion having been given—

Barstow shewed cause, and objected to that part of the rule which asked for a stay of proceedings.

Godson, contra, referred to the remark of the Court in *Jones v. Howe* (a), from which it might be inferred that a rule for judgment as in case of a nonsuit might be drawn up with a stay of proceedings, if two days' notice of the motion were given.

PER CURIAM.—The Master says it is against the practice; the rule must therefore be discharged, as to that part which prays for a stay of proceedings, with costs.

Rule accordingly.

(a) 2 M. & W. 380.

SMITH v. MILLER.

In a country cause, where no notice of trial has been given, the defendant cannot move for judgment as in case of a nonsuit until after two assizes have elapsed.

BAYLEY shewed cause against a rule nisi for judgment as in case of a nonsuit. It was a country cause, the venue being Hertfordshire: issue was joined in Easter term, but no notice of trial given. He relied on *Gough v. White* (a) as an authority that this motion was too early.

(a) 2 M. & W. 363.

Wightman, contra, referred to the note in Jervis's Rules, *Exch. of Pleas*, 82, where it is said that in a country cause, where issue is joined in an *issuable* term, and no notice of trial given, the defendant cannot move for judgment as in case of a nonsuit until the term after the second assizes. Here issue was joined in a non-issuable term, which distinguishes the case; and *Robinson v. Taylor* (a) is a direct authority in support of the application. *Gough v. White* was a town cause.

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LORD ABINGER, C. B.—I have always understood that the former practice—and the new rules do not alter it—was, that where there had been no notice of trial, the plaintiff had two terms to go to trial in a town cause, and two assizes in a country cause. I think it makes no difference when issue was joined, whether in an issuable term or not.

PARKE, B.—According to the former practice, this motion would have been too soon: and the Court decided in *Gough v. White*, that the new rules, which render it no longer necessary to enter the issue, make no difference in the time of moving for judgment as in case of a nonsuit.

ALDERSON, B.—It is very desirable to have one general rule, where the plaintiff does not take the case out of it by giving notice of trial; otherwise there would be one rule for cases before the sheriff, and a different one for country causes at the assizes. It has been decided as to cases before the sheriff, that where there has been no notice of trial, the defendant cannot move for judgment as in case of a nonsuit until two terms have elapsed (b).

Rule discharged, with costs.

(a) 5 Dowl. P. C. 518.

189; *Wright v. Skinner*, 1 C. M.

(b) *Butterworth v. Crabtree*, 1
C. M. & R. 519; 3 Dowl. P. C.

& R. 746; *Harle v. Wilson*, 3
Dowl. P. C. 658.

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LAVERACK v. BEAN.

If the Judge of an inferior court of record receives a certiorari after the time limited by the 21 Jac. 1, c. 23, s. 2, a procedendo will issue. And that, although in the meantime the record has been filed in the Court above.

MARTIN had obtained a rule nisi for a procedendo, directed to the judge of the Borough Court of Record at Hull, on an affidavit which stated that a certiorari had been delivered in this cause after issue joined, but before the jury was sworn; and that issue was not joined within six weeks next after the defendant's appearance. It appeared also from the affidavits, that the writ of certiorari was returnable on the 2nd of November, on which day this rule was moved for, and that the record had in the mean time been filed.

Crowder shewed cause.—The statute 21 Jac. 1, c. 23, s. 2, no doubt prohibits the judge or officer of the inferior Court from receiving the certiorari in such a case as the present; if however he does receive it, although after the time limited by the act, the case is then taken out of the operation of that statute, and falls within the 43 Eliz. c. 5, s. 2; the writ having been delivered before any of the jury were sworn. In *Cox v. Hart* (a), a procedendo was refused after interlocutory judgment, and before final judgment, though the plaintiff had given notice of executing a writ of inquiry. That case was confirmed in *Godley v. Marsden* (b). But secondly, the record, having been filed, cannot now be remanded to the Court below: *Tidd's Pr.* 411, (9th edit.). The motion should have been to take it off the file.

PARKE, B.—The record, under the circumstances of the case, was irregularly on the file, and may therefore go down again to the inferior Court. As to the other point, this is clearly a case falling precisely within the words of

(a) 2 Burr. 758.

(b) 6 Bingh. 433.

the 21 Jac. 1; and the officer, having been a wrong-doer in receiving the writ, is now to be corrected by this Court. He would otherwise have it in his power to neutralize the statute altogether.

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ALDERSON, B., and GURNEY, B., concurred.

Rule absolute.

ARCHER v. GARRARD.

PETERSDORFF had obtained a rule for setting aside the judgment signed in this cause for irregularity. The declaration, which was in debt, was delivered on the 1st November; on the 6th, the defendant, without having obtained any rule to plead several matters, delivered the following pleas: as to all the sum demanded except 40*l.*, *nunquam indebitatus*; as to 40*l.*, a tender and payment into court. On the 8th the plaintiff signed judgment.

Where several pleas are pleaded, which amount only to one entire answer to the declaration, (as the general issue to part, payment to other part, &c.), no rule to plead several matters is necessary.

Erle shewed cause.—The question is, whether, under the rule of H. T., 2 W. 4, s. 34, the defendant was not bound to obtain a rule to plead several matters. The rule has been so construed in practice.

PARKE, B.—If all the pleas together amount only to one entire answer to the matters in the declaration, they amount but to one plea. If the rule has been construed otherwise in practice, it has been construed very wrongly.

ALDERSON, B.—The rule clearly refers to several pleas going to the whole action.

Rule absolute.

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REGINA v. The Sheriff of MIDDLESEX, in a Cause of
DIGNAM v. REITTER.

Bail came up to justify at chambers on the 20th October, on which day the rule to bring in the body expired, but were rejected on account of a defect in the notice of justification. The Judge made an order for three days' further time to justify, "without prejudice to the sheriff's being in contempt;" and the bail justified within that period:—*Held*, that an attachment issued against the sheriff was irregular.

HUMFREY had obtained a rule to shew cause why an attachment issued against the sheriff of Middlesex should not be set aside for irregularity. The defendant was arrested on the 6th October; on the 7th the sheriff was ruled to return the writ: on the 12th, special bail was put in: on the 16th, the plaintiff's attorney gave notice of exception, and served the rule to bring in the body. In the morning of the 20th, the bail came up to justify at chambers, but were rejected, on the ground of an irregularity in the notice of justification; and the learned Judge then made an order, giving three days' further time to justify bail, "without prejudice to the sheriff's being in contempt." The bail justified on the 23rd.

Petersdorff shewed cause.—The attachment was regular. The rule of H. T. 3 W. 4, requires, that where a rule to return a bailable writ expires in vacation, the sheriff shall bring the defendant into court, by putting in and perfecting bail above, within the same number of days as by the practice of the court is prescribed with respect to rules to bring in the body issued in term. Here the sheriff was bound to justify bail on the 20th; and as soon as the learned Judge decided that the bail could not justify on that day, the sheriff was in contempt. [*Parke, B.*—It seems, therefore, that the Judge's order ought to be thrown out of the case. The sheriff was in contempt if he did not justify bail on the 20th: he could not, because there was no proper notice; therefore he was inevitably in contempt.]

Humfrey, contra.—The sheriff was not in contempt at the time of the order, because he had the whole of that

day to bring in the body. The meaning of the order is, without prejudice to his being in contempt at that time; otherwise the time given is a great injury instead of a benefit to the defendant, since it subjects him to the costs of an attachment.

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PARKE, B.—The Court are of opinion, that the true meaning of the order is, that the time should be given without prejudice to the sheriff's being in contempt at the time of the order. That clause of the order was not necessary in this view of the case, but it may have been introduced *pro majori cautela*. It is to be read, therefore, as if it contained the word "now." I thought differently at first, but the rest of the court are of that opinion, and I will not say that I dissent.

ALDERSON, B.—The probable meaning of the clause was this: that, the argument having been addressed to the learned judge, that the sheriff was in contempt by reason of the rejection of the bail, he made the order without prejudice to that question. That question has now been argued, and the Court think the sheriff was not then in contempt.

BOLLAND, B., and GURNEY, B., concurred.

Rule absolute.

MORRALL and Another v. PARKER.

A RULE had been obtained for setting aside the bail-bond given in this cause, on the ground of a defect in the affidavit to hold to bail, which stated the defendant to be indebted to the plaintiffs in — for money by the plaintiffs "and their *late co-partners* C. and D." lent and advanced to the defendant at his request. An affidavit in support of the rule stated that one of the parties described as the plaintiffs' late co-partners was still living.

Affidavit to hold to bail, for money lent by the plaintiff and "his *late co-partners*, C. & D.:"—*Held* insufficient, inasmuch as it did not shew that they were dead.

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1837.

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v.
PARKER.

W. H. Watson shewed cause, and urged that if the affidavit was sufficient on the face of it, it could not be impeached aliunde. Here it might be intended, on the affidavit itself, that the plaintiff sued as surviving partner.

PER CURIAM.—The deponent could not be indicted for perjury on this affidavit, on the ground that the parties described as "late co-partners" were alive.

Rule absolute.

Erle in support of the rule.

HARRISON v. RIGBY.

An affidavit of debt for principal and interest on a bill of exchange drawn and accepted by the defendant, and payable to the deponent at a day past, &c. Held sufficient.

COWLING moved for a rule nisi for setting aside the capias and subsequent proceedings for irregularity, on the ground of a defect in the affidavit to hold to bail. The affidavit stated that the defendant was indebted to the plaintiff in 20*l.* "for principal money and interest on a bill of exchange drawn and accepted by the defendant, for 16*l.*, and payable to the deponent at a day past," &c. The objection was, that the affidavit did not follow the ordinary form in stating who was the drawee. The defendant might have both drawn and accepted it, without its having been drawn upon himself: he might have accepted it for the honour of another party.

PARKE, B.—I think nobody can mistake the meaning of the affidavit.

Rule refused.

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CAUNCE v. RIGBY.

COWLING had obtained a rule to set aside the *capias* and subsequent proceedings to outlawry in this cause, on the ground of a defect in the affidavit to hold to bail. The affidavit stated that the defendant was indebted to the plaintiff in the sum of 31*l.* for work and labour done by him for the defendant at his request, and in the further sum of 20*l.* on a bill of exchange drawn by the defendant on one John Robinson, and indorsed to the plaintiff; "which said John Robinson made default in payment of the said bill when due." The objection was, that there was not a sufficient statement, as against the drawer, of the acceptor's default.

Semble, that in an affidavit to hold to bail, by the holder against the drawer of a bill of exchange, it is not sufficient to state in general terms that the acceptor made default in payment of the bill, but that such a default must be shewn as renders the drawer liable, viz. a refusal to pay on presentment.

Wightman shewed cause, and relied on *Witham v. Gompertz* (a), and *Crosby v. Clarke* (b), as authorities to shew that the affidavit need not state the fact of presentment or notice, but that it was sufficient to allege a default in the acceptor.

If an affidavit be good as to one distinct sum stated in it, and that be an arrestable amount, it is no objection that it is bad as to another sum stated in it, unless it appears that process has issued on it for the whole amount, and not for the former sum only.

Cowling contra.—The affidavit must state, not merely in these general terms that the acceptor has made default, but the facts which shew the default; otherwise the word *indebted* would of itself be enough, since that infers a default in payment by the acceptor. The deponent may have confounded the distinction between the primary liability of the acceptor and the secondary liability of the drawer. He may mean merely that the acceptor did not go to find out the holder and pay the bill, not that he made default on the bill being presented to him. No indictment for perjury could be sustained on this affidavit, any more than upon the mere word *indebted*. It ought to

(a) 2 C. M. & R. 736.

(b) 1 M. & W. 296.

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RIGBY.

shew on the face of it such a default as renders the drawer liable. [*Alderson, B.*—Undoubtedly, making default as acceptor may have a different meaning as against himself or as against the drawer. A default in the acceptor to charge himself may be a simple omission; to charge the drawer, it must be a default by *refusal*. But is the affidavit bad as to the first part of it, which relates to a separate sum of money?] *Kirk v. Almond* (a), and *Baker v. Wills* (b), are authorities that an affidavit of debt bad in part is bad altogether. [*Alderson, B.*—No doubt, if it were shewn that the defendant was arrested for the whole amount; but suppose it was only for the *£11*.—would the Court set it aside? It does not appear what amount was indorsed on the writ.] It is for the plaintiff to shew that the writ was not sued out for the whole amount mentioned in the affidavit. [*Alderson, B.*—No; the Court is not to assume an irregularity until it is proved. If the writ was indorsed for *£11*., why is it not good, being supported by an unobjectionable affidavit to that amount?] It is submitted, that, the affidavit being defective, the capias issued irregularly on it, and ought to be set aside.

ALDERSON, B.—I am not aware of any case in which a distinct part of an affidavit being good, and the amount mentioned in such good part only being indorsed on the capias, the affidavit has been held bad; and I think there hardly could be such a case. The rule must be discharged.

Rule discharged, with costs.

(a) 2 C. & J. 354.

(b) 1 C. & M. 238.

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SMART v. JOHNSTONE.

A RULE had been obtained to set aside the bail-bond given by the defendant, on entering a common appearance, upon two grounds: first, that the defendant was a Scottish peer, by the title of Earl of Annandale and Viscount Johnstone, and had voted as such without objection, in the election of representative peers for Scotland, in the year 1832; and secondly, that the copy of the capias delivered to the defendant contained no date.

The omission of the date in the copy of a capias served on the defendant, is an irregularity for which the defendant will be discharged on entering a common appearance.

Platt shewed cause on an affidavit that inquiries had been made at the Heralds' Office, and that the officers there stated that the defendant was not a Scottish earl, and that there were fifteen claimants for the title; and cited *Luntley v. Battine* (a) as an authority, that where the claim was so doubtful, the Court would not interfere on motion.

R. V. Richards, for the defendant, relied, as to this point, on *Digby v. Earl of Stirling* (b); but

THE COURT held, that the writ was irregular for the omission of the date, and on that ground made the rule absolute, without deciding upon the question of privilege.

Rule absolute.

(a) 2 B. & Ald. 234.

(b) 8 Bing. 55; 1 M & Scott, 116.

 DAVIES v. LLOYD.

R. V. RICHARDS had obtained a rule to shew cause why the writ of summons in this cause should not be set

An action of debt for a penalty for bribery, under the Muni-

cipal Corporation Act, is not within the Uniformity of Process Act, requiring an indorsement on the writ of summons of the amount of debt and costs.

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aside for irregularity, on the ground that, although it purported to be an action of debt, there was no indorsement on it of the amount of the debt and costs, as required by the Uniformity of Process Act. The defendant's affidavit stated that he did not know the plaintiff, and was not in any manner indebted to him.

Welsby shewed cause on an affidavit, stating that the action was brought for the recovery of a penalty for bribery, under the Municipal Corporation Act, 6 Will. 4, c. 76, s. 54; and contended that this was not a case within the meaning of the Uniformity of Process Act. It had been decided that an action of debt on a bail-bond or replevin-bond was not within the act: *Rowland v. Dakeyne* (a).

Richards, contra. — This is a claim for a debt, and therefore comes within the meaning of the act. [*Parke*, B. — The defendant is entitled to compound—is he to be limited to four days to do so? *Alderson*, B. — The result of a verdict against him is to make him liable not only to the payment of the penalty which is claimed as the debt, but also to disqualification for municipal offices for his life.]

Lord ABINGER, C. B. — This is certainly not a case within the act. The rule must be discharged, but without costs, because the writ *primâ facie* was for an ordinary debt, and the defendant was therefore justified in coming to the Court.

Rule discharged.

(a) 2 Dowl. P. C. 832.

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1837.

AIKMAN v. CONWAY.

IN this case, a rule to plead was left at the office at 3 o'clock on the 26th October, and at 6 o'clock on the same day notice was served of the declaration being filed. A plea was delivered on the 31st, but was returned, judgment having been signed. On the 11th November, *Chandless* obtained a rule to set aside this judgment for irregularity, on the ground that the rule to plead, having been entered before notice of declaration, was irregular: *Bennett v. Smith (a)*. A summons had been taken out for the same purpose before *Bolland, B.*, at chambers, on the 4th November, and the learned Baron referred the case to the Court.

There is no irregularity in entering a rule to plead before notice of declaration, but on the same day.

R. V. Richards shewed cause, and contended, in the first instance, that the application was too late. In *Hinton v. Stevens (b)*, it was held that an objection very much of the same nature ought to be taken within four days.—The Court, however, held, that the motion was in time, and *Richards* then contended that there was no irregularity, the rule to plead and notice of declaration having both been given on the same day. If it were otherwise, the time for pleading would be virtually extended to five days in all cases where the defendant resided at any considerable distance from the office.

Chandless, contra, relied on the judgment of the Court of Common Pleas in *Bennett v. Smith*, where it was laid down without qualification, and without any exception as to both acts being done on the same day, that “the rule to plead cannot be left at the office till after the defendant has been served with notice that the declaration has been filed.”

(a) 3 Bing. N. C. 305 ; 3 Scott, 673.

(b) 4 Dowl. P. C. 283.

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CONWAY.

THE COURT sent to inquire from the officers of the Court of Queen's Bench as to the practice of that Court on the point; and shortly afterwards,

PARKE, B., said—Master Le Blanc certifies to us, that if both acts are done on the same day, there is no irregularity; the Court will not inquire at what hour each was done. That avoids the inconvenience stated by Mr. *Richards*, and distinguishes this case from *Bennett v. Smith*.

ALDERSON, B.—It is a good rule, that when two things are done on the same day, that shall be presumed to have been done first which ought to be so.

Rule discharged, without costs.

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Debt on bond conditioned for the payment of an annuity. Plea, that the writing obligatory was made after the passing of the 53 Geo. 3, c. 141, and that the annuity was granted for a pecuniary consideration, and that no memorial of the said writing obligatory, containing the names of all the witnesses thereto, and the date of the writing obligatory, and the names of all the parties thereto, or of the person for whose life the annuity was granted, and of the person by whom the annuity was to be beneficially received, or of the pecuniary consideration for granting the said annuity, or how such consideration was paid, or the annual sum to be paid thereby, was enrolled in Chancery. Replication, that a memorial was duly enrolled (setting it out), and averring that it contained the statements mentioned in the plea. Rejoinder, that the memorial contained divers false statements relating to matters of fact material to the validity of the annuity, especially in this, that the memorial imported and represented that the consideration for the annuity was paid in notes of the Bank of England, whereas it was never paid in such notes or otherwise, modo et formâ as in the replication alleged: and so the defendant again says, that there never was any such memorial as by the act of Parliament is required, enrolled in Chancery as the act requires:—*Held*, on special demurrer, that the rejoinder was not a departure from the plea.

DEBT on a bond conditioned for the payment of an annuity.—Plea, that the said writing obligatory was made and entered into by the defendant to the plaintiff after the passing of a certain act of Parliament, (53 Geo. 3, c. 141), and that the said annuity in the said condition mentioned was granted upon and for a pecuniary consideration in that behalf; and *that no memorial of the said writing, containing the names of all the witnesses thereto, and the date of the*

said writing obligatory, and the names of all the parties thereto, or of the person for whose life the said annuity was granted, and of the person by whom the said annuity was to be beneficially received, or of the pecuniary consideration for granting the said annuity, or how such consideration was paid, or the annual sum to be paid thereby, was enrolled in the High Court of Chancery, according to the directions of the said act of Parliament: whereby the said writing obligatory in the said declaration mentioned is null and void—concluding with a verification.

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Replication—that a memorial of the said writing obligatory in the declaration mentioned was, within thirty days after the execution thereof, to wit, on the 10th day of January, 1832, duly enrolled in the High Court of Chancery, at Westminster, in the county of Middlesex, according to the directions of the said statute; which said memorial was and is as follows—[here the memorial was fully set out, with the columns filled up in the usual way, the consideration for the annuity being stated to have been paid in Bank of England notes,] as by the said memorial now remaining duly enrolled in the said High Court of Chancery more fully appears; and the plaintiff further saith, that the said memorial did duly contain and set forth the day of the month and the year when the said writing obligatory in the said declaration mentioned bore date, and the names of all the parties, and of all the witnesses thereto, and of the person for whose life the said annuity was granted, and of the person by whom the same was to be beneficially received, and the pecuniary consideration, and how much consideration was paid for granting the same, and the annual sum to be paid, in the form and to the effect as in and by the said statute in that case made and provided is required; as by the said enrolment of the said memorial remaining of record in the said Court of Chancery will more fully appear; and *this the plaintiff is ready to verify by the said record*, when, where, and in such manner as the Court here shall order and direct.

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Rejoinder—The defendant, as to the plaintiff's plea by way of reply to the plea of the defendant by her above pleaded in bar, says, that the said memorial therein set forth contains divers false statements and representations touching and relating to certain matters and facts material and essential to the validity of the said annuity, and to the maintenance of this action, and especially in this, to wit, that the said memorial imports and represents that the consideration of and for the said annuity, to wit, 600*l.*, was paid in notes of the Governor and Company of the Bank of England, whereas in truth and in fact the said 600*l.* was not nor was any part thereof paid to the said Elizabeth Cracknell in notes of the Governor and Company of the Bank of England, or otherwise howsoever, in manner and form as the plaintiff hath in his said plea by way of reply alleged; and so the defendant in fact again saith, that there never was any such memorial as by the said act of Parliament is required enrolled in the said High Court of Chancery, according to the direction of the said act of Parliament; (concluding to the country).

To this rejoinder there was a special demurrer, and the plaintiff assigned the following causes:—That the rejoinder seeks to put in issue that which is matter of record, and which was vouched to be tried by record; and also that it concludes to the country upon matters which are not triable by a jury. And also that the said rejoinder introduces new matter of fact, and yet concludes to the country, instead of concluding with a verification. And also that the said rejoinder is a departure from the matter contained in the plea in bar.

Barstow, in support of the demurrer.—The defendant, by not setting forth the memorial in her plea, has lost the opportunity of taking advantage of any of the facts stated in it. The plaintiff, in his replication, has set out the memorial as enrolled in Chancery, which is good upon the

face of it, and he has properly treated it as a record; and the replication properly concludes, "And this the plaintiff is ready to verify by the said record." *Richardson v. Tomkies* (a). The plea in effect is, that there was no memorial. Then the plaintiff replies, setting out the memorial; and then the defendant, instead of pleading nul tiel record, rejoins that the memorial contains divers false statements and representations, which is a clear departure from the plea. The defendant ought to have pleaded nul tiel record. [*Parke, B.*—Might not the defendant shew that there was no memorial as required by the statute?] The case of *Praed v. The Duchess of Cumberland* (b) is an authority to shew that this is a departure. That was an action of debt on an annuity bond, and the plea was, that there was no *such* memorial as the statute required; to which the plaintiff replied, that there was a memorial which contained the names of the parties, and the consideration for which the annuity was granted: the defendant rejoined that the consideration was untruly alleged by the memorial to have been paid to both obligors, for that one of them did not receive any part of it; and this rejoinder was held bad, as being a departure from the plea. *Ashurst, J.*, said, "The rejoinder is clearly a departure from the plea in bar. A memorial was enrolled, which, upon the face of it, was a good one; and if the defendant wished to impeach it, she should have pleaded it, and shewn in what particular it was defective, and thus have compelled the plaintiff to take issue upon the fact. But having in her plea in bar alleged that there was no memorial, she ought not afterwards to be permitted to admit in her rejoinder that there was one, and then deny the validity of it." And *Buller, J.*, says, "Nothing is clearer, than that this is a departure: the defendant's argument goes to admit it. The whole question

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(a) 2 M. & Scott, 56; 9 Bing. 51.

(b) 4 T. R. 585.

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turns on the word 'such.' Now, what is the meaning of the plea in this case—or of the plea of no award—or that of no *capias ad satisfaciendum*? they tender issues in fact, and not in law. We are not to require, under the allegation of 'no such memorial,' everything that is required by the act of Parliament; it is merely an issue in fact. So in the case of an award, if there be an award in fact, the party cannot, on the trial of an issue of no award, go into objections to the award in point of law." [Parke, B.—In the report of that case in error (a), the true reason why the rejoinder was held bad was stated by Eyre, C. J., namely, because the rejoinder introduced a fact which went to vitiate the deed, but not the memorial (b).] In stating the ground of their decision, affirming the judgment of the Court below, no disapprobation is expressed of the reasons given by the judges of the Court of King's Bench. It is supposed, however, that the decision in *Fisher v. Pimbley* (c) has broken in upon the authority of *Praed v. The Duchess of Cumberland*; but it is submitted that it does not. That was debt on bond conditioned to perform an award: plea, no award; replication, setting out an award: rejoinder, stating the whole award, and then demurring. It was held that the rejoinder was not inconsistent with, nor a departure from, the plea. Now the sole effect of that was, that the defendant might by setting it out shew that there was no valid award; because the recital of the submission on the face of the award shewed that the award was not warranted by it. Lord *Ellenborough* there says: "The award being bad, the only question is, whether the defendant can shew such bad award in his rejoinder, con-

(a) 2 H. Blac. 280.

(b) So it is said by *Bayley, J.*, in *Dudlow v. Watchorn*, 16 East, 41, that "the ground on which the judgment was affirmed in error was, that the rejoinder intro-

duced a fact which went to vitiate the deed granting the annuity, and not to shew that there was no memorial of the bond."

(c) 11 East, 188.

sistently with his former allegation in the plea that there was no award. The plaintiff in his replication sets out an award; and if he had set it out truly, it is clear that the defendant might have demurred to it; but not having set it out truly, where is the inconsistency or departure from the plea, in the defendant's doing that which the plaintiff ought to have done, setting out the award in fact, and then demurring to the true award so set out?" So here, if he had set it out truly, he might have demurred to it if there was any objection on the face of it; but this memorial was good, at all events, upon the face of it. [Parke, B.—It comes back to the question whether the plea means no memorial in fact, or no valid memorial. I do not know whether it was an oversight, but there is no clause in the recent act, 53 Geo. 3, c. 141, which requires the consideration to be truly stated in the deed.] According to *Harding v. Holmes* (a), it amounts to no memorial or no award at all in fact. The earlier cases to be found in *Levinz* (b) are to the same effect. The defendant ought, if he had any objection to the memorial, to have taken the objection in an earlier stage of the proceedings. He referred to *Askew v. Mackreth* (c), *Simmons v. Hunt* (d), *Flight v. Buckeridge* (e), and *Darwin v. Lincoln* (f).

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Bere, contra, was stopped by the Court.

PARKE, B.—In *Fisher v. Pimbley*, the award was not bad on the face of it, except as set out on the pleadings—not on the face of the award itself: the submission appeared on the pleadings as a matter of fact pleaded. The question simply is, what is the meaning of the plea. I have not the least doubt the meaning of the plea is—not that there was no memorial at all—but that there was not such a

(a) 1 Wilson, 122.

(d) 1 Marsh. 155.

(b) *Skinner v. Andrews*, 1 Lev.

(e) 3 Bing. 215; S. C. in error

245; *Seal v. Crowe*, 3 Lev. 165.

6 B. & C. 49.

(c) 1 New Rep. 214.

(f) 5 B. & Ald. 444.

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memorial as the act of Parliament requires—no valid memorial. In *Fisher v. Pimbley*, (a), Lord Ellenborough says: “In the rejoinder he still maintains his former allegation, that there was no award, in other words that there was no legal and valid award under the submission, which is the same as no award.” The true ground of the decision in *Praed v. Duchess of Cumberland* is that stated in the Court of Error (b), namely, that the plea stating that there was no memorial, the rejoinder introduced a fact which went to vitiate the deed, but not the memorial. I do not subscribe to the doctrine of the Court below in that case.

ALDERSON, B., and GURNEY, B., concurred.

Barstow afterwards obtained leave to amend, (on producing an affidavit shewing reasonable ground for believing that the consideration money was duly paid), so that the plaintiff might be able to take issue on the rejoinder—otherwise judgment for the defendant.

(a) 11 East, 191.

(b) 2 H. Blac. 284.

BACON v. SIMPSON.

Assumpsit.—
The declaration
alleged that the
plaintiff was

ASSUMPSIT. The declaration stated, that the plaintiff, at the time of the making of the agreement of the defendant, lawfully possessed of a house for the residue of a term of six years, and of certain goods, furniture, &c. therein, and that the plaintiff agreed to assign the lease of the house to the defendant at a certain price, and the furniture, &c. at a valuation, possession to be delivered on a certain day; and averred that she was, from the time of making the agreement, ready and willing to assign her interest in the house, and to deliver up possession of the goods at a fair appraisement. The defendant pleaded pleas traversing the readiness and willingness to assign the interest in the house, and to deliver up the furniture. It was proved at the trial that the greater part of the house and furniture were destroyed by fire shortly after the agreement, and before the time for its completion.

The agreement provided that either party making default should pay to the other 500*l.* as liquidated damages. After the making of the agreement, but before the day for its completion arrived, the parties agreed, by an indorsement on the former agreement, to enlarge the time for its performance for a few days:—*Held*, that this amounted to a fresh agreement. But *quære* whether it was an agreement, the subject-matter whereof was of the value of 20*l.*, so as to require a fresh stamp.

fendant hereinafter mentioned, was lawfully possessed *Exch. of Pleas,*
 that is to say, *for the residue of a term of six years, of* 1837.
and in a certain dwelling-house and premises, &c., and
also of certain household furniture, tenant's fixtures, chat-
tels, and other effects, then being on the said premises;
 and thereupon, on the 9th of November, 1836, by a cer-
 tain agreement made between the plaintiff of the one part,
 and the defendant of the other part, it was agreed, that
 the plaintiff should sell and assign the said lease, with the
 outbuildings and premises, for the sum of 200*l.*; and the
 plaintiff thereby agreed to sell to the defendant all her
 household furniture, tenant's fixtures, horses, carriages,
 hay, corn, implements, and effects, then on the said pre-
 mises, which she might have a right to sell, at a fair valua-
 tion, to be made by two appraisers; and the plaintiff
 agreed, that possession of the premises should be given to
 the defendant on or before the 1st day of January then
 next, on being paid the aforesaid premium for the lease,
 and for the goods, fixtures, stock in trade, and effects;
 and the defendant agreed to purchase the said lease and
 the said household furniture, tenant's fixtures, &c., and to
 take possession and pay for the same on or before the
 said 1st day of January. And the said parties thereby
 mutually agreed, that if either of them should make de-
 fault, he should pay to the other the sum of 500*l.*, as or in
 the nature of liquidated damages. The declaration then
 stated, that, after the making of the agreement, and before
 the said 1st day of January, to wit, on the 31st day of
 December, 1836, by a memorandum indorsed on the
 back of the before-mentioned agreement, it was agreed
 between the parties, in consequence of the said 1st day of
 January being inconvenient, to postpone the completion
 of the said agreement until the 6th day of January. The
 declaration then averred, that, from the time of making
 the agreement hitherto, the plaintiff *was ready and willing*
to assign and convey her interest in the premises, &c.,

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and to assign and deliver to the defendant her household furniture, fixtures, horses, carriages, hay, corn, implements, and effects as aforesaid, at a fair appraisement, and to deliver possession, and complete and fulfil the said agreement, upon the 5th day of January. Breaches assigned in nonpayment of the premium, &c.

Pleas: 1st, That the plaintiff was not possessed of the said dwelling-house and premises, household furniture, tenant's fixtures, chattels, and other effects, or any part thereof, in manner and form, &c.

2ndly, That the plaintiff was not ready and willing to assign and convey the estate and interest which she had in the said dwelling-house and premises at the time of the making of the said agreement.

3rdly, That the plaintiff was not ready and willing to assign and deliver to the defendant her household furniture, tenant's fixtures, horses, carriages, hay, corn, implements, and effects.

4thly, That the plaintiff was not ready and willing to deliver possession, and to complete and fulfil the said agreement, according to the effect and meaning thereof, in manner and form, &c.

The cause was tried before Lord *Abinger*, C. B., at the Middlesex Sittings after last Trinity Term, when the agreement with the defendant, dated the 9th of November, 1836, was properly proved, and was in the terms stated in the declaration. Upon the back of this agreement there was an unstamped indorsement, for postponing the time for its completion from the 1st to the 6th of January. It appeared from the evidence, that the plaintiff was the widow of a sub-lessee, and that she did not take out administration until the 30th of December, 1836. On the evening of the day when the original agreement was entered into, the principal dwelling-house and a great part of the furniture and effects were consumed by fire. On the agreement being produced in evidence, the defen-

dant's counsel objected to the reading of the indorsement upon the agreement, on the ground that it required a stamp. The learned judge however received it in evidence. It was further contended by the defendant's counsel, that the plaintiff had no right or interest in the subject-matter of the agreement before administration granted, and could not, therefore, support the first issue. It was also objected, that by the terms of the original lease, a licence in writing was required from the lessor for any assignment or under-lease, and that such licence was not proved. On this last point the Lord Chief Baron directed a nonsuit to be entered.

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Kelly, on a former day in this term, had obtained a rule (on affidavits) to shew cause why the nonsuit should not be set aside, and a new trial granted. Against this rule

Thesiger now shewed cause.—If there is any ground on which the nonsuit can be sustained, the Court will not set it aside. The first objection arises on the first issue, the object of which was to raise the question of property in the plaintiff, because at the time the contract was entered into she had not taken out letters of administration, and in law there could be no title by relation back in such case. There is no property in an administrator before administration by relation back afterwards, as there is in the case of an executor who subsequently proves a will: *Doe d. Hornby v. Glenn* (a). It was there decided that the title of the administrator commences only from the time of the granting of the letters of administration. So in *Middleton's case* (b), it is laid down that “an executor before probate may release an action, although that before probate he cannot have an action, for the right of action is in him. But if A. releaseth and afterwards taketh adminis-

(a) 1 Ad. & Ellis, 49 ; 3 Nev. & M. 837. (b) 5 Coke, 28.
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tration, it shall not bar him, for the right of the action was not in him at the time of the release." That is a complete authority in favour of the defendant. This is a question of contract, and the declaration states that the plaintiff was "lawfully possessed" of the premises for the term of six years," which must be shewn; and though actual possession might be sufficient as against a wrong-doer, it is not enough here; and if it was, it ought to have been so declared upon. The case of *Carwick v. Blagrove* (a) shews the materiality of this averment. In covenant for nonpayment of rent on an indenture, by the assignee of the lessor against the lessee, the declaration alleged that the *lessor was possessed* for the remainder of a term of twenty-one years, commencing in 1797, and that in March 1811, he, by indenture, demised to the defendant to hold from the 20th December then last past: plea, that the lessor was not at the time of making the indenture possessed for the residue of the said term modo et forma:—and it was held that the plea was good, as the averment in the declaration was material and traversable. The first plea here also applies to the household furniture, and the defendant is therefore entitled to have a nonsuit entered. The second objection is, that the agreement for postponing the performance of the original contract, was a distinct agreement, and required a fresh stamp; and the circumstance of its being indorsed on the original agreement does not affect the question: *Reed v. Deer* (b), *Stephens v. Lowe* (c). There is this distinction between the latter case and the present, that here the new agreement was made before the original one had expired, whereas in that case the memorandum was written after the time for making the award had elapsed: but in either case it is a new agreement, and requires a fresh stamp. Thirdly, it appeared from the evi-

(a) 4 Moore, 303; 1 Brod. & B. 531.

(c) 1 Moo. & Scott, 442; 9 Bing. 32.

(b) 7 B. & C. 261.

dence taken at the trial, that on the very day the agreement was signed the premises were burnt down, and a great part of the furniture and fixtures destroyed by the fire. It therefore became impossible for the plaintiff to assign all the subject-matter of the contract at the time stipulated for. Now, the averment in the declaration, that the plaintiff was at all times ready to assign, refers to all the premises, furniture, and articles comprised in the original agreement, and that being entire, could not be performed in part. In answer to that it may be urged, that subsequent to the fire the defendant had gone on negotiating for a completion of the purchase; but the pleadings are not applicable to the supposed case of a waiver having taken place arising from such negotiation as to the part destroyed. If so, the plaintiff ought to have replied the waiver in answer to the second and third pleas. The plaintiff was bound, on these pleadings, to shew a readiness and willingness, and a capacity, to assign *all* the premises, furniture, &c., comprised in the agreement. In *Stent v. Bailis* (a), the Master of the Rolls says:—"If I should buy a house, and before such time as by the articles I am to pay for the same the house be burnt down by casualty of fire, I shall not in equity be bound to pay for the house." The house, the fixtures, and the furniture remained the property of the seller, and at her risk, until she had done all things respecting them that she had agreed to do: *Zagury v. Furnell* (b), *Rugg v. Minett* (c). Here no property was to pass in any of these goods until they were valued. At the time the fire happened, the whole remained the property of the vendor.

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Kelly, in support of the rule. [Lord *Abinger*, C. B.—Address your argument to the two last points advanced.] The indorsement of the enlargement of the time for the

(a) 2 P. Wms. 220.

(b) 2 Camp. 240.

(c) 11 East, 210.

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performance of the original agreement does not require a stamp ; the indorsement does not vary or alter the substance of the agreement, but only enlarges the time for its completion. If a stamp were necessary in such a case, it would be necessary in every case where the time for making an award is enlarged by the agreement of the parties, in cases where no power of enlarging the time is given to the arbitrator ; yet in such cases no one ever thought that a stamp was requisite. *Stephens v. Lowe* is not an authority in point, because there is a great distinction in principle between a case where the time is enlarged *before* the time has expired, and where it is enlarged *after*. In the former case, the parties continue under the obligation they had originally entered into, and by which they are still bound. In the latter, the agreement is at end, and the parties are as free from all obligation as they were before entering into it ; and though they may profess only to modify their supposed existing agreement, they, in reality, enter into a new agreement altogether. The latter was the case of *Stephens v. Lowe*. [Parke, B.—I do not see what difference that can make in point of law. It is equally an agreement, whether it is made before or after the time has expired, and as such, must require a stamp, provided it be of the value of 20*l*. Gurney, B.—The one is an agreement to revive, the other to continue, the stipulations of the contract. Alderson, B.—Is not this an agreement containing a new term ? If you were to state the one in pleading, and give the other in evidence at the trial, it would be a variance, and for this reason, that they are different agreements. It cannot be put more favourably for you than as an agreement to waive a stipulation for a penalty in a former agreement.] It is not denied that if this had been an agreement to release one party from a penalty, that that would have been a new agreement ; but here it is for the mutual benefit of both parties, and the mere deferring of the time when the agreement is to be

performed is not sufficient. In *Stephens v. Lowe*, the time had elapsed, and the agreement was totally at an end. At all events, if this indorsement is to be considered as a new agreement, it is not an agreement the subject matter of which is of the value of 20*l*. The stamp laws are to be construed strictly, and if there is any doubt, the objection ought not to prevail. This is only the substitution of one day for another, made before the time for performing the contract had arrived, and not the case of a party having broken his contract, and with a view to escape a penalty. The time given might have been of some benefit to the parties, but it is impossible to say what—it might be worth 20*s.*, or 20*l.*, or no benefit at all; for the penalty might never have been incurred. Testing it by the value of the alteration merely, it cannot be said that there is any thing to bring it within the Stamp Act. [*Alderson*, B.—In *Kensington v. Inglis* (a), the memorandum extending the time of sailing would have been within the Stamp Act, if it had not been for the provisions of the particular statute 35 Geo. 3, c. 63, s. 13, which provides that the act imposing the stamp shall not extend to prohibit the making any lawful alteration in the terms or conditions of the policy. Lord *Abinger*, C. B.—There was a penalty to arise upon the non-performance of the contract by a given day; an agreement to postpone the time when the penalty shall be payable, must be an agreement, the matter whereof is of the value of the penalty.] Suppose, under the first contract, 40*l*. deposit was to be paid, and by the subsequent agreement 5*l*. of it was to be waived; or suppose it was to add other chattels not of 20*l*. value, to those previously sold? [*Alderson*, B.—That would be merely a conveyance of the particular things added, but here is a new conveyance of the whole property on a new day. Lord *Abinger*, C. B.—It strikes me, if parties agree to sell

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(a) 8 East, 273.

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a given number of things at a given price, and afterwards two more are added of a value under 20*l.*, that is not a contract confined to those articles, but is a contract for all the subject-matter of the first agreement, with two other things added. The new agreement applies to the whole.]

The other objection is, that the premises having been partly burnt down, and the furniture partially destroyed by fire, the plaintiff cannot be said to have been ready and willing to assign what she had contracted for. The question as to the house was different to that as to the furniture, for the assignable interest in the land remained; and it might have been left as a question to the jury, whether, in the absence of any objection made, or any withdrawal from the agreement on account of the injury done, the defendant did not assent to a partial performance of the contract; and whether, after such assent, the defendant ought to be allowed to say that the plaintiff was not ready to perform the contract. [*Parke, B.*—Your declaration is on the old agreement. There might have been a new agreement to take the house as it was, or the furniture as it remained; but that is not the contract declared upon.]

Lord ABINGER, C. B.—I am of opinion that upon this last objection, the plaintiff ought to be nonsuited. I think that, upon this form of the pleadings, the plaintiff was certainly bound really to complete the contract, and that in the very terms stipulated for; whereas what had taken place, the goods being in a great measure destroyed by fire, put it out of her power to do so; and I think, therefore, that the contract could not afterwards be binding on these parties. The argument of Mr. *Kelly* would have great force, if it was the fact that the parties considered the contract was at an end, but agreed to act on the terms of it as far as it went. As to the remainder of the goods, the defendant had entered into some new arrangement with the

landlord's agent for reletting the premises, and waiting a certain time; and if that had been carried into effect, they might have complied with the terms of the contract as far as the circumstances of the case would permit them; but it might be said that was making a new agreement. However, the pleadings bind the plaintiff down to the old contract. The plaintiff declares that she was ready to comply with the terms of the old contract, and the defendant takes issue on that, and pleads that she was not ready to perform her part of it on the day stipulated; upon which it is stated in reply, that there was an understanding between the parties that a portion of the goods should be given up on account of the goods that had been burnt, and that she was ready and willing to supply the remainder. That shews that she was not in a situation really to perform all that the terms of the contract bound her to perform on the day stated in such contract. The plaintiff ought to have been ready to have performed on the day specified all that the contract bound her to do—now she clearly was not. On that ground, therefore, I think the plaintiff ought to be nonsuited. But on the other ground also, I strongly incline to the same opinion, because there was a new contract, with an increased time for performing the agreement; and that being so, it ought to have been stamped as a new agreement.

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PARKE, B.—I am also of opinion that the rule obtained in this case ought to be discharged. As to the first question, whether the allegation contained in the declaration was proved, namely, that the plaintiff was lawfully possessed of the term in the leasehold house at the time of the making of the contract, I confess I think that allegation was not proved—there may be a question upon it—but I am inclined to think that that was an immaterial issue,

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the question being whether the contracting party could make a good title at the time when the agreement was to be carried into effect. As to the second objection, I feel some doubt, not whether this memorandum is an agreement, for I am satisfied it is, but whether we should be justified in going so far as to hold that the memorandum is above the value of twenty pounds. I say no more about it than that there seems to be some doubt upon that part of the case, and therefore I do not pronounce my opinion upon it: I certainly should not think it right to refuse the rule, as at present advised, on that ground. But on the third ground I am clearly of opinion that the plaintiff ought to be nonsuited, because she has not made out an issue that was upon her, namely, the averment that she always had been, and was, ready and willing to make out a good title to all the goods at *the sale*. Now, that agreement,—which we consider as the original agreement, which was afterwards rendered invalid, and which original agreement entered into between the parties stipulated that all the household furniture and tenant's fixtures, together with the horses, carriages, hay, corn, and implements of husbandry then on the premises, should be sold at a fair valuation—that is the contract entered into between the parties, and which on the plaintiff's part she is to fulfil, and the defendant is to pay for the various articles above specified on a valuation; and this declaration then proceeds to aver, as it ought to do, that she always was perfectly ready and willing to dispose of her said estate and interest which she was possessed of in her house and premises, with the good-will; and also to deliver over to the said defendant her household furniture, fixtures, &c., together with the horses, carriages, hay, corn, and implements, in words as large as were contained in the original agreement. The plaintiff is bound to maintain that issue; and when we come to see what the fact is, it turns out that a very

considerable portion of the goods have been destroyed by fire, so that it was completely out of her power to deliver them as she originally bound herself to do. Then all that remained to her, and were in her power capable of being delivered, might have been made the subject of a new agreement; but then this declaration ought to have been framed on the new agreement.

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ALDERSON, B.—I am of the same opinion. It seems to me that the third objection is conclusive, and I have nothing further to add on that subject to what has fallen from the rest of the Court. As to the objection on the stamp I think that ought to prevail also. In the case of *Attwood v. Small* (a), there were three agreements: the first agreeing to sell certain property; in the second there were some alterations made in the terms of the former one; these two agreements were properly stamped: there was then a third, which was indorsed on the second, and which made some alterations in the former. This was stamped with a 11. stamp. An objection was taken that the latter was not properly stamped, inasmuch as the instrument had incorporated the words in the original agreement, and that an additional stamp was necessary on account of the number of words. Now the Court do not say that no stamp at all was necessary, but give a conclusive answer by saying, that the only criterion as to the number of words in an agreement is the number of words contained in the instrument itself.

GURNEY, B.—I think the objection as to the want of a stamp is well founded; and as to the other, it is clear the plaintiff could not have completed the contract, for she avers that she was ready and willing to complete the whole

(a) 7 B. & Cr. 390; 1 M. & R. 246.

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contract, when by the destruction by fire of the house, and a great part of the furniture, it was impossible for her to do so.

Rule discharged.

IRVING and Another v. VEITCH.

The defendant was indebted to the plaintiffs in a balance of 2,245*l.*, for which they held his overdue promissory note. In 1827, the plaintiff and defendant agreed that the defendant should pay the balance as follows:—245*l.* in cash, and the remainder by annual payments of 300*l.* a year out of his salary as a consul abroad, and by the proceeds of certain wines consigned by him to India; and that the plaintiff should hold his promissory note as a security for the payment of the account. The 245*l.* was paid, and the 300*l.* was also duly paid in 1828 and 1829, but the defendant made default in pay-

THE first count of the declaration stated, that the defendant, heretofore and in the lifetime of Sir Thomas Reid, Bart., and George Irving deceased, to wit, on the 30th November, 1824, made his promissory note in writing, and delivered the same to the plaintiffs and the said Sir Thomas Reid and George Irving, trading under the firm of Messrs. Reid, Irving, and Co., and thereby promised to pay them the sum of 1187*l.* 10*s.* on the 31st December, 1825, which period had elapsed before the commencement of this suit. The second count was on another note of the same amount and date, payable to the same parties on the 31st December, 1826. There were also counts for money lent by the two plaintiffs to the defendant, money paid, money had and received, interest, and on an account stated between the defendant and the plaintiffs. The defendant pleaded, first, the Statute of Limitations to the whole declaration; secondly, non-assumpsit to the common counts. At the trial before Lord Abinger, C. B., at the London Sitings after Trinity Term, the following appeared to be the facts of the case:—

The plaintiffs, Mr. John Irving and Sir John Rae Reid, Bart., in conjunction with their late partners, Sir Thomas Reid and Mr. George Irving, merchants in London, trading under the firm of Reid, Irving, and Co., were the

ment of it in September 1830:—*Held*, that the plaintiffs were entitled, at any time within six years from September 1830, to sue the defendant on the promissory note, or for the balance remaining due, on a count upon an account stated.

★ Where a debtor draws a bill of exchange, to be applied in part payment of the debt, and the bill is paid when due by the drawee to the creditor, it operates as part payment, to defeat the Statute of Limitations, only from the time of the delivery of the bill by the debtor, not from the time of its payment.

agents and correspondents in London of the defendant, who was a merchant in Madeira, and held for many years the situation of British consul general and agent in that island. In the year 1824, the defendant, who was indebted to Messrs. Reid, Irving, and Co. in a considerable sum, having come over to England, was arrested at their suit for 5000*l.* and upwards, and, while in custody, he entered into the arrangement for the payment of the debt set forth in the following letter :—

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“ Messrs. Reid, Irving, and Co.

“ London, 30th Nov. 1824.

“ Gentlemen,—I beg to recapitulate, in order to prevent any misunderstanding hereafter, the terms upon which you have consented to discharge me from the action you commenced for the recovery of your balance against me, and to accept a composition for the payment of your debt : and I hereby confirm the arrangement most fully on my part. My uncle, Mr. Robert Veitch, has, in consideration of your acceding to the arrangement, consented to advance you 1000*l.* in part payment of the debt, and you are from this date to debit his account with you to that amount : I have also this day given an order on Mr. Simon Cock to pay you the further sum of 1000*l.* out of the first monies which may come into his hands arising out of property or effects received or to be received by him, belonging to me or to my late firm of Scott, Pringle, Veitch, and Co. ; and I confirm that order as irrevocable.

“ I now inclose you my two promissory notes, payable to your order, for 1187*l.* 10*s.* each, the one due the 31st December, 1825, and the other the 31st December, 1826 ; and these notes are given to you in payment of the remainder of your claims against me, and agreed by you to be received, when paid, in full of all demands. As a security for these two notes, I hereby distinctly confirm the appropriation of the proceeds of certain Madeira wines

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shipped by my house at Madeira to Mr. John Park for sale, and you will apply such proceeds towards the discharge of the said notes; and in case the proceeds of the wines should exceed the amount of the notes, you will be accountable to me for such surplus as may be received by you on that account; but in the event of their falling short of the said amount, and the same not being paid otherwise when due, I hereby engage, being required by you to do so, to make my salary as consul of the island of Madeira subject to the payment of whatever balance may remain unpaid. You will please to hand me my acceptances in your hands given on account of the old balance due from my Madeira firm, retaining only that one for £550*l.* which bears the indorsement of my uncle Mr. Robert Veitch, whose liability in respect thereof is not intended to be weakened or in any way affected by the present arrangement.

Henry Veitch."

[Then followed a list of the wines referred to as shipped by the defendant to Mr. Park.]

The notes inclosed in the above letter were those declared on in the present action. When they respectively became due, the wines had not been disposed of; and they were accordingly presented for payment to Mr. Cock, at whose residence they were made payable by the defendant, but were not paid. Messrs. Reid, Irving, and Co. did not however protest them for nonpayment, or give the defendant any notice of their dishonour; and matters remained in the same state until July 1827, when the defendant, having again come to England, made, through Mr. Cock, further propositions for the settlement of the plaintiffs' claim. The plaintiffs, in answer to this application, wrote to Mr. Cock as follows:

"Broad Street Buildings, 30th July, 1827.

"S. Cock, Esq.

"Dear Sir,—We have perused your memorandum of the

terms proposed by Mr. Veitch. We do not at all agree in his view of the agreement's not binding him to payment until the wines shall have been realized, for the fact of bills having been taken forms a conclusive argument against it. The bills brought the debt to a fixed date, and the wines formed a collateral security. We are therefore justified in calling for the immediate payment; but having said thus much for the justice of our cause, we will add, that we continue in the same desire we have always expressed, to give Mr. Veitch all the indulgence that consists with it; we are therefore willing to accede to his proposal to reduce the debt to 2000*l.* by a present payment, and discharging the 2000*l.* by equal payments in five years; the wines to remain with us, and go against the last instalment pro tanto: but we must insist on its bearing interest, the arrangement being (as we contend) to oblige Mr. Veitch, and not us. We subjoin a note of the sum due to us, which will amount on the 1st proximo to 2,245*l.* 17*s.*; and consequently Mr. Veitch will have to pay us 245*l.* 17*s.* in cash, besides the 2000*l.* and interest, to be secured to us; and we should wish to know in what shape the security on his salary is proposed to be given, as we require it to be made an effectual one.

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"We are, &c., Reid, Irving, and Co."

On the receipt of this letter the defendant wrote to Mr. Cock as follows:—

"S. Cock, Esq. "London, 24th September, 1827.

"Dear Sir,—In consequence of the discussions that have taken place regarding the arrangement required to be made for the final liquidation and settlement of my accounts with Messrs. Reid, Irving, and Co., and in order to effect this object, I have to request you will accept my draft for 245*l.* 17*s.* at four months' date in their favour, and further pay them out of my salary as H. M. agent and consul general at Madeira, which, as my duly authorized

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attorney, you are entitled to receive at the Foreign Office, the sum of 300*l.* annually, commencing the 30th Sept. 1828, until by such annual payments, together with the remittances of the proceeds of wine at Calcutta, (which Messrs. Reid, Irving, and Co. are authorized, by their agent at that place, to sell for my account), the remaining balance of 2000*l.* shall be discharged, and for which they hold my over-due acceptances.

I am, &c., Henry Veitch."

Mr. Cock accordingly accepted the defendant's bill at four months for 245*l.* 17*s.*, which was duly paid: and he also paid to the plaintiffs the instalments of 300*l.* each, out of the consular salary, which fell due on the 30th September, 1828, and on the 30th September, 1829; but the instalment which became due on the 30th September, 1830, was not paid. It appeared also, that in the year 1829, Messrs. Ferguson and Co., of Calcutta, sold, on the defendant's account, certain portions of the wines above mentioned, and drew for the amount of such sale, on their correspondents in London, a bill for 1112*l.* 11*s.*, dated 29th September, 1829, payable six months after sight to Reid, Irving, and Co. This bill arrived in London in March, 1830, and was immediately presented to the drawees, who paid it when due, on the 5th September following. It was further proved, that, in March, 1833, the plaintiffs received, as agents for the defendant, a dividend on the estate of one Waddington, a bankrupt, who, in the year 1814, had underwritten a policy of insurance effected by the plaintiffs on a vessel of the defendant's, a loss upon which was proved under his bankruptcy by the plaintiffs, in 1816. The accounts-current between the plaintiffs and the defendant had been carried on, with the addition of interest, down to the year 1833, some small payments having been made, from time to time, on account of Waddington's estate, which were entered to the defendant's credit. This action was commenced on the 6th July, 1836.

It was contended for the plaintiffs, that the case was taken out of the operation of the statute in three several ways:—First, by the agreement made between the parties in July 1827, the effect of which was, that the account was kept open, and the plaintiff's right of action suspended, until default should be made in payment out of the consular salary, or by the proceeds of the wines, which default did not occur until September 1830, until which period, therefore, the plaintiffs' right of action did not accrue; secondly, by the receipt of the proceeds of the bill on account of the wines, in September 1830; and thirdly, by the receipt of the dividends on the bankrupt's estate. The Lord Chief Baron reserved the questions arising on the plea of the Statute of Limitations, and the plaintiffs had a verdict for the sum of 1557*l.* subject to a motion to enter a nonsuit.

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Kelly having obtained a rule nisi accordingly,

Maule, *Cresswell*, and *Bayley* now shewed cause.—First, this case never was within the operation of the Statute of Limitations at all; or, secondly, if it was, it was taken out of it, either by the payment on account of the proceeds of the wines, or by the payment of the dividends.

1. The transactions between the parties in 1827 amounted to an account stated, with an undertaking to pay in a certain mode, viz. by annual instalments out of the consular salary, and by the proceeds of the wines. It was an agreement that a new fund should be provided from both these sources, for the payment of the debt then remaining due. On that agreement no action could be brought until the defendant made default in the performance of its terms, i. e. until September 1830, when default was made in the payment of the instalment then due out of the salary. The right of action could not accrue until

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the plaintiffs had something to complain of on their contract. No action, therefore, for the balance ascertained and provided for by that agreement, could be maintained until September 1830; and if so, neither could an action on the promissory notes. The right of action on the notes was suspended until that default, and when it occurred, a new cause of action on them accrued. If it were not so, it would follow that a creditor, by giving his debtor time, for good consideration, for seven years, absolutely released the debt. If a party *voluntarily* forbears a debt, without consideration, the statute, no doubt, continues to run notwithstanding; but that is not so where time is given under such circumstances as to suspend the right of action. [*Parke, B.*—Then must not the agreement be declared upon as a new promise? Is it a promise to pay “according to the tenor and effect” of the notes? No doubt there was a reservation of the plaintiff’s right to sue on the dishonoured acceptances: but were they not, on default, remitted to their original right on the notes, which, at that time, was not subject to be defeated by the statute?] The plaintiffs are entitled, at all events, to recover on the account stated. It is an analogous case to that of goods sold on credit: within six years of the expiration of the credit, the seller may sue on the general count for goods sold and delivered, alleging a promise to pay on request: *Helps v. Winterbottom* (a). So here, the action on the account stated never accrued until the default; the defendant then became indebted in the balance, to be paid on request. [*Parke, B.*—The difficulty is, how to make out that proposition in the case of an account stated. Does it not mean that the parties account together concerning monies to be *then* paid on request? In the case of goods sold, the difficulty has been got over by a series of cases, which assume that when the period of credit is

(a) 2 B. & Adol. 431.

expired, the defendant is indebted for goods sold, which he is then liable to pay for on request.] It must, on principle, be as necessary to state specially a contract to pay for goods on credit, as to state the contract specially in the case of an account stated. In *Wheatley v. Williams (a)*, this Court held, that an instrument, whereby the defendant promised to pay the plaintiff the balance of his account in two years, was evidence of an account stated at the time when it was signed, but that it shewed also that the cause of action did not accrue until two years afterwards, and therefore that the action was well brought within six years after the expiration of that time. But this action is maintainable also on the promissory notes. By the account stated, the defendant agreed that they should remain in the hands of the holders, to secure the payment of the balance due. The transaction amounted, in effect, to a part payment of the balance, evidencing a new promise to pay the amount of the notes. The "tenor and effect" of the notes is this, and the liability on them is this:—that the defendant undertakes to pay them at any period when he is not protected by law from paying. The plaintiffs have a right to sue upon the instrument which is a security for the performance of an agreement, as long as they have a right to sue for the breach of the agreement. Suppose a party transfers a note by indorsement when over-due,—may not the indorsee declare generally upon it? This action, therefore, never was within the Statute of Limitations, not having accrued until the month of September 1830.

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But, secondly, if the case was within the statute, it was taken out of it, 1st, by the payment of the bill in September 1830, or, 2ndly, by the receipt of the dividends. The defendant agrees that the plaintiffs shall receive the proceeds of the wine in India, in order to liquidate their

(a) 1 M. & W. 533.

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balance of account. When this bill was paid, in part performance of that agreement, that was a part payment of the balance, so as to defeat the operation of the statute. [Parke, B.—The question is, when the *implied promise to pay*, which is vouched by the part payment, admitting a larger sum to be due, is made. Surely *the delivery* of the bill by the defendant, or his agent, on account of that larger debt, is the fact whence the promise is inferred. Alderson, B.—You seek to make the agent who *pays* an agent to make the acknowledgment to take the case out of the statute.] The actual promise by the defendant himself was so far back as 1827; but by the contract then made, the proceeds of the wines are to be paid over, under some authority or other, to the plaintiffs. The delivery of the bill by the defendant is only one step towards the fulfilment of that contract. Either, therefore, the action is barred from the time when the contract was originally made, or it is not barred until the time when it is carried into complete effect. If the remittance of the bill from India implies a promise *then*, it is because the act of the defendant's authorized agent is the defendant's act; if so, the act of his authorized agent by *payment* is equally his act. [Parke, B.—The party on whom the bill was drawn was no agent to make a promise to pay the remainder of the debt. It is very difficult, indeed, to arrive at the conclusion even that Ferguson & Co. are agents of the defendant.] The payment of the bill shews that the debt was then due. [Parke, B.—Suppose all the rest of the money had been paid during the currency of the bill—how would it then admit a greater debt then due?]

Lastly, the case is taken out of the statute by the payment of the dividends under Waddington's estate, which it is not denied that the plaintiffs had authority to receive on the defendant's account. The current mercantile account was kept open until then, and the action for the

balance does not arise until the close of the payments (a).

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Kelly and Tomlinson, contra.—Two answers are set up to the objection arising on the Statute of Limitations. First, as to the argument that the case is taken out of the statute by the payments proved at the trial. The argument as to the payment of Ferguson & Co.'s bill in substance amounts to this:—that a payment on account made by an agent defeats the statute from the time of the payment. That argument is founded on an erroneous view of the doctrine of law as to the effect of part payment. The Statute of Limitations itself contains no exception in regard to part payment; and it is no part of the law that a *payment* ipso facto takes a case out of the operation of the statute. But a long series of decisions having established that an *acknowledgment* of the debt, being evidence of a promise to pay, revives the debt, and founds a new cause of action: part payment operates to defeat the statute, only because it is impossible to suppose that a debtor, who pays part of his debt, does not admit the existence of the residue: *Waters v. Tompkins* (b). But the law can be thus defeated only by the act of the debtor himself: there is no authority that from part payment by an agent an acknowledgment can be inferred by the debtor (c). But there is in fact no proof of payment by any agent of the defendant. There was no evidence of authority of any kind given to Ferguson & Co., or even that the defendant knew anything of them. But even if they were his agents for the sale of the wines, and assuming that their act would bind him, the payment of the bill was not by them. The parties who paid the bill were surely no agents to make an acknowledgment of the existence of the whole debt.

(a) But see *Williams v. Griffiths*, 2 C. M. & R. 45.

(b) 2 C. M. & R. 723.

(c) See *Hyde v. Johnson*, 2 Bing. N. C. 776.

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Their agency is limited and defined by the bill itself—simply, at a certain time, to pay the amount specified in it, and place it to the account of the drawer. The acknowledgment *by the defendant*, if made at all, must have been made, not when the bill was paid by the parties who were agents only to pay it, but when it was put into their hands by the defendant, or his authorized agent, for that purpose. The fallacy lies in not distinguishing between the effect of the payment quoad the sum paid, and its effect, as an acknowledgment, on the residue of the debt. At however long a date the bill is given, it cannot operate as any suspension of the remedy as to the residue of the debt; it can affect it only from the time when given by the debtor. *Gowan v. Foster (a)* is an express authority for the defendant on this part of the case. But there is also another way of testing the question. Suppose that between the time of the order to apply the proceeds of the wine to the plaintiffs' use, and the actual payment, the defendant had died. The plaintiffs say a new promise was made by the defendant in September 1830—could they have sued on a promise by his executor? The statute would clearly have been an answer to any action on a promise made by the defendant himself: *Green v. Crane (b)*, *Sarell v. Wine (c)*. Again: Lord Tenterden's Act, 9 Geo. 4, c. 14, requires that a promise, to revive the debt, shall be in writing; but a promise by an agent will not be sufficient—it must be signed by the party to be charged. Before that statute, a promise by the defendant, and a part payment by him, were identical in effect: the Court is therefore now called upon to hold that that which is the evidence of a promise *may* be done, not by the defendant himself, but by an agent.

As to the receipt of the dividends, *Williams v. Griffith (d)*

(a) 3 B. & Ad. 507.

(c) 6 East, 409.

(b) 2 Lord Raym. 1101; 1 Salk.

(d) 2 C. M. & R. 45.

28; 6 Mod. 309.

is a clear authority that, since Lord Tenterden's Act, it is insufficient to defeat the statute.

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Lastly, as to the effect of the agreement made in 1827, and the default in payment by the defendant in 1830. In the first place, there was no new consideration for the contract so made by the defendant, and it therefore raised no new promise; and the statute having then begun to run—for the notes were then overdue, and the remedy upon them was open—it continued to run notwithstanding the subsequent contract. But at all events, the new contract ought to have been specially declared on. The situation of the parties, on the breach of that contract, is this:—first, the plaintiffs are remitted to their original remedy in the state in which it then was, as to the operation of the Statute of Limitations, or otherwise; and secondly, they are entitled to a new action on the new contract, on which they might declare as a contract for forbearance of the debt, to be paid by instalments, stating a breach in nonpayment of the instalment in 1830; or they might join counts for both causes of action; but they cannot incorporate the two. The plaintiffs may have an enlarged period for suing on the new contract, but they take that in substitution for the loss of their remedy on the old contract. It is distinctly laid down in *Tanner v. Smart* (a), and *Haydon v. Williams* (b), that where the plaintiff seeks to defeat the Statute of Limitations by a promise to which a condition is annexed, he must declare specially on such conditional promise. The count on the account stated is relied upon on the other side, and the case is likened to that of goods sold on credit; but the cases are quite distinguishable. Where goods are sold on credit, as soon as the time of credit expires, the count for goods sold and delivered fully applies, for the defendant is then indebted in the price of goods “before then

(a) 6 B. & Cr. 603; 9 D. & R. 549.

(b) 7 Bing. 163; 4 M. & P. 811.

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sold and delivered," and to be paid for on request. But the old form of the account stated (and the abbreviated form given by the new rules cannot alter the case,) is wholly different. The accounting is laid to be at the time when the promise is made—stating that the parties accounted together concerning monies before that time due and owing and *then in arrear* from the defendant to the plaintiff, and that *upon such accounting* the defendant was found to be in arrear and indebted to the plaintiff, and being so indebted, then and there promised to pay. If the defendant promised to pay at a future time, that promise does not support the count. If it be an accounting to pay at a future day, the contract must be alleged accordingly. It is clear there was in fact no accounting in 1830: there was in 1827—but what promise arose on that? If it was a promise to pay upon request, more than six years have elapsed, and the statute is a bar; if a promise to pay upon condition in 1830, it ought to have been so alleged. Suppose the defendant had died in 1829—how could his executor be charged? A promise by the defendant—after his death—could not be alleged; nor, as clearly, could a promise be implied by the executor, on the consideration given to the defendant in his lifetime. At all events, it ought to appear that the balance remains the same at the end of the period for which the payment is postponed, whereas here it was altered in the meantime by various payments and charges. How can the promise to pay the balance struck in 1827 operate as a promise to pay some supposed future balance, different in its nature and amount, existing in 1830? How would the defendant know, in such case, to which period to apply a plea of payment?

Lord ABINGER, C. B.—This case has occupied a considerable time in the argument, a longer time indeed than, according to my impression from the very first, was neces-

sary. Upon one part of it the case appears to me to be perfectly clear. I will just state the facts of the case, that they may be fully understood. In the year 1825 a considerable difference is due from Veitch, who was a Madeira merchant, and consul at Madeira, to the plaintiffs, who were his correspondents in London, and he gives, in order to satisfy the balance, certain promissory notes, one of which falls due in the month of December 1825, and the other in the month of December 1826; these are dishonoured, and no further transaction takes place between the parties at that time; but Mr. Veitch happens to be in London in the year 1827; and upon that, the parties holding him liable for the account stated and acknowledged by him, and also for the promissory notes, a negotiation was entered into between them, and an agreement come to, in order to enable him to satisfy that difference. At that time he was consul at Madeira, and was entitled as such consul to receive a salary, which was paid at the Foreign Office; and his proposition, offered to them through his agent, Mr. Cock, is this: You will place to my account the two promissory notes, amounting to 2,245*l.*, if you will be content to take my bill of exchange on Mr. Cock for the sum of 245*l.*, part of the balance, and to accept my order on Cock, which I will give him, to pay 300*l.* a year out of my salary, which he is authorized to receive at the Foreign Office, on the 28th day of September in each year; and also to take an engagement that the wines which are now in India, and which were to be plied to our general account, shall be apportioned also in payment of the balance. The plaintiffs returned for answer, that on consideration they accepted the terms, and were ready to enter into that engagement; and the terms are—the whole forming one contract—that Cock shall give his bill of exchange for the sum of 245*l.*; that the defendant shall write a letter to Cock, authorizing him to pay the sum of 300*l.* a year; and that Cock, who is the

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party with whom they negotiated, shall pay that money out of the salary. Now I will say nothing about the wine at present ; it would appear the wine was then in India, and all parties understood that the proceeds of that wine would be remitted, in some shape or other, to the plaintiffs, in satisfaction of the balance ; and it was agreed, over and above, that 300*l.* a year should be paid, till the balance of 2000*l.*, after deducting the bill of exchange, was satisfied. Now a question has been made whether that was a binding agreement—whether there was a good consideration given for it by the plaintiffs. Why, it is generally understood, when a party is entitled to receive a debt from another, that if he receives, either in part or whole, the security of a third party on account of it, it is a good consideration for a promise on his part to forbear the debt and give time ; and here, moreover, the party makes an agreement that the money which comes into the hands of his agent, which agreement his agent recognises and means to act under, shall be appropriated to a specific fund. I think that constitutes a valid and binding consideration. Then, in the year 1828 the first instalment is paid ; in 1829 the second is paid ; in 1830 a bill of exchange is remitted, and arrives in the month of March, and is due at six months' sight, and is paid some time in September. On the 28th of that September Mr. Veitch omits to pay the 300*l.* Now the question made is, whether or not the plaintiffs—for this action is brought in July 1836, within the six years, therefore, from the month of September 1830—are barred by lapse of time. Now, if the plaintiffs had no right of action whatever but that which existed either in the year 1824, when they first stated the balance, or in the year 1827, when the account was stated, and nothing had occurred to give them a right of action afterwards, there is no doubt they are barred. Then the question is, whether or not, when that account was stated and settled, and one

entire contract come to in the year 1827, the plaintiffs could at that time have brought an action on an account stated; and I am clearly of opinion they could not: indeed, that has been already expressed by stating that the contract was a valid contract to forbear the remainder of the money, on condition of these sums being annually paid. If they could not, then it is plain no right of action accrued to them as the result of that engagement; but a breach was made in the engagement by the non-payment of the instalment in the year 1830; and it is admitted both by *Mr. Kelly* and *Mr. Tomlinson*, that the breach of that engagement certainly took place within the six years; but then they say, upon this form of declaration the statute applies, though they admit the plaintiffs had a mode of declaring to which it does not apply. That reduces it to a mere question of form, and therefore the question is this:—Whether or no, when a party has a debt for which he has a right to bring an action on account of such re-engagement as is proved here, when that engagement is broken by the party who makes it, that breach remits the creditor to his original right to sue in the same way as he originally might have sued. If that had been an original question in this case, if there had been no current of authorities on the subject, and the case had been *res integra*, it might have been a good ground for discussion whether the statute had barred the remedy on the original promise; if so, then this action ought to have been on the new promise. But I think that has been settled, and soon after the statute passed; and if any body will take the trouble to look at *Sir William Jones's Reports*, and to the *Modern Reports*, and other Reports which were published about the time of *Charles II.*, and in the reign of *William III.*, he will find that very point discussed and settled—whether rightly or wrongly we are not now about to inquire—that the party is remitted to his original form of declaration. The first case which arose on the Sta-

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tute of Limitations was in the Court of Chancery; it was more common in those days for matters of account to be taken there, and the Chancellor was in the habit of referring to the Judges of the common-law courts as to what was their construction of the statute; but it was the practice for the defendant to plead the whole statute, and set it forth; and the plaintiff, if he relied upon the new promise, specially replied to it. According to the modern mode of pleading, the plaintiff takes issue on a general plea of the statute, and gives the matter in evidence, and it is not pleaded to by a replication: but the question arose very early, whether or not, where upon the face of the declaration the contract appeared to be out of time, the defendant might demur; and the Court decided he could not. The principle upon which they decided that an acknowledgment of the debt gave the party a new right, was that where a man was indebted to another for an originally good consideration, and the Statute of Limitations barred the remedy when six years had elapsed, yet, if there was a good consideration for a new promise in *foro conscientiæ*,—an equitable and conscientious consideration, that made the promise binding; the result of which might have been, as I said before, to oblige the plaintiffs to declare upon the new promise; but the Court held that was not necessary. I will now refer to a more modern case, which came before the Court on a writ of error—*Gould v. Johnson* (a): that was an action upon a bill of exchange, where upon the face of it the time had elapsed some years, and there was a promise stated to have been made in writing several years before; and upon the writ of error the objection was taken, that the count could not be maintained: but the answer was, that it was not necessary for the party suing to set forth any thing but the original right of action as it stood; and

(a) 2 Lord Raym. 838.

two reasons were given by the judges : one was, that the other party might reply that the writ was issued so as to keep the cause of action alive, and within the six years ; and the other was, that he might reply generally. There is also a case of *Leaper v. Tatton* (a), in which this very question arose in the Court of King's Bench. That was assumpsit on a bill of exchange, and also upon an account stated ; the bill was payable above six years before the action was brought ; it was contended at the trial that the promise to pay within the six years took it out of the statute. Lord Ellenborough having directed a verdict to be found for the plaintiff, a motion was afterwards made, and that very objection was taken, that the declaration ought to have been upon the new promise. Lord Ellenborough had a very considerable knowledge of the forms of pleading ; and his answer was, that if this was the right form of declaration that was insisted upon, it was enough to say it had never been in use, but that it was the common practice to declare on the original contract. It is said, however, that this doctrine does not apply to this count on an account stated. I see no reason for that : the account stated is nothing more than the admission of a balance due from one party to another ; and that balance being due, there is a debt ; and when a man is indebted, there is always a good consideration for his promise. The very statement of the account, and admission of the balance, implies a promise in law to pay it. If, at the time that is done, another engagement is made, which binds the party to pay the difference in a certain course of payment, which prevents the party from bringing the action until a certain period has elapsed, what is the result ? Why, if the debtor does not perform that engagement, the creditor is remitted to his original right ; and we ought to presume a promise to pay at that time, because

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the defendant is indebted, which forms a good consideration for the promise; but the promise could not exist during the running of the conditional contract, because it was an open contract, and he was capable of performing it. Therefore I see no difficulty at all in supporting the plaintiff's right to sue upon the original contract, the moment the new contract was broken by the non-payment of the instalment due in the year 1830. This doctrine is also held in other cases, as well as in relation to bills of exchange. One is the case of *Wittersheim v. The Countess Dowager of Carlisle* (a), where it appeared that the plaintiff had taken a bill of exchange as a security for money to be paid in a certain time, and he did not bring his action until after the six years had elapsed from the time he lent the money. The Court held, that though, on a mere loan of money the time of limitation might commence from the date of the loan, yet, where the money was lent on a special contract for repayment, it was the time of the repayment that ought to fix the period of the limitation. So I say here, the right of action only accrued from the time the contract made in 1827 was broken by the defendant; and that being within the six years, the plaintiffs are entitled to sue: but if any doubt could exist,—I own none exists in my mind,—the account stated is the same in principle as goods sold and delivered,—but if that fails, what shall be said of the promissory notes? It is expressly a part of the bargain, that the promissory notes shall stand as a security for the performance of the contract,—for the payment of the money agreed upon to be paid by instalments. Is that part of the contract inoperative and ineffective, and to go for nothing? What is the meaning of it, but that the plaintiffs shall be at liberty to sue on the notes, if the defendant does not comply with the contract? Can they sue on the promissory notes in

(a) 1 H. Bl. 631.

the mean time? Certainly not; but they might have brought their action the very day after the defendant failed to perform the contract, by paying the instalment of 300*l.* a-year; that was within the six years from the time the action is brought, and that is to be taken as the time when the action accrued. On these grounds, it seems clear to me that the payment of the instalment under the contract having failed, and a breach having taken place in the performance of it, this remitted the plaintiffs to their original right to bring an action, either on the account stated, or upon the promissory notes, at the time when the breach was committed.

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Upon this point, the Court are agreed that it is sufficient to discharge this rule. The other part of the case, which I think very important, whether the application of the 1100*l.* is to be taken as payment on account by the defendant, so as to take the case out of the Statute of Limitations, being a point on which the Court are not agreed, it is not necessary to deliver any opinion upon it, as there is sufficient for us to say that the rule ought to be discharged on other grounds.

PARKE, B.—I am of the same opinion in this case, that the rule should be discharged, on the third ground upon which the case was sought to be taken out of the Statute of Limitations: that ground is, that there was an agreement between the parties in the year 1827, which constituted a new and binding agreement between them, distinct from the original debt; and the doubt I have had during the course of the argument was only whether or not it was necessary to declare upon that agreement, or whether the plaintiffs could recover upon either count of this declaration. Now it is clear to my mind, that unless this was a binding and valid agreement between the parties, giving the plaintiffs a new remedy for a new consideration, the

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transaction in 1827 would not have taken the case out of the Statute of Limitations. It is essential, in order to take the case out of the Statute of Limitations, that there should be a new and binding agreement between the parties, and a new consideration, to pay the debt by instalments, and upon failure in payment of those instalments, to pay the other original debt; and although Mr. *Kelly* succeeded in raising a doubt in my mind whether there was any fund provided by means of the assignment of the consular salary, so as to constitute a new engagement,—though I have a doubt whether there is such a binding engagement, I have no doubt whatever that there was a sufficient consideration in Cock's accepting the bill of exchange on behalf of the defendant, as the price of the plaintiff's giving time upon the original promissory notes. There can be, I conceive, no doubt on this part of the case, that Mr. Cock having become liable to pay the amount of his acceptance, in consideration of the plaintiffs' giving time to Veitch upon the promissory notes until any failure should take place in the payment of the salary, that is a new and binding engagement between the parties; and there is no doubt the declaration could have been so framed upon the new agreement; and there would have been no breach of that agreement until the month of September 1830, when the first failure took place in the payment of the consular salary. The question then is, whether the declaration as it stands at present is not sufficient, and whether the case cannot be taken out of the statute, upon this declaration, by means of the new engagement; and, after having entertained some doubt, I think it is taken out of the statute, and the count upon the promissory note may in this case be sufficient. On looking to the terms of the agreement, it appears to me, that it amounts to an agreement on the part of the defendant to pay by instalments, and, provided the instalments are not duly paid, to pay the original debt: it is, therefore, a promise, in certain events, to pay the original debt it-

self, and those events have occurred by which the original debt has become payable, because the instalments have not been duly paid, there having been a non-payment of the last instalment in September, 1830; therefore the conditional promise to pay the original debt becomes absolute, and the defendant becomes indebted upon the promissory notes; and then, I take it, we may apply to this case the principles laid down by the Court in the case of *Stone v. Rogers* (a), that those events having happened which have made the defendant a simple debtor by virtue of his new promise, he may be declared against as being indebted upon the promissory notes; and it is upon that ground it seems to me that the counts upon the promissory notes may be sustained.

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With respect to the count upon the account stated, I do not mean to intimate any difference of opinion with my Lord Chief Baron on the subject; but I must own I feel some doubt whether, from the peculiar form of it, there has been that species of accounting which the count charges; and therefore I would rather found my judgment upon the counts on the promissory notes, because I am quite satisfied as to that ground, and feel some doubt upon the account stated. Feeling that the Courts have not intended that there should be any difference in its import from the old account stated, and that being apparently an account stated of a debt then due and payable upon the notes, I feel some little doubt upon that; but as to the counts on the promissory notes, I think there is abundant evidence of a promise to pay the notes, and the defendant is a simple debtor for that amount; and I do not understand that there is any case which is at variance with that conclusion. The two cases of *Tanner v. Smart* and *Haydon v. Williams*, were cited by Mr. Tomlinson as being authorities to shew that if the promise was con-

(a) 2 M. & W. 443.

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upon as such; but I find nothing in those decisions to affect my opinion upon this part of the case. According to the facts of this case, the conditions have been performed, so that the debt upon the promissory notes is absolute, and may be declared upon in the ordinary form. In *Tanner v. Smart*, Lord *Tenterden*, in giving judgment, says (a) "The promise proved here was, 'I'll pay as soon as I can,' and there was no evidence of ability to pay, so as to raise that which in its terms was a qualified promise, into one that was absolute and unqualified." The whole of that decision is this, that when a man acknowledges a debt, and makes a qualified promise to pay it, you are to take it altogether—you are not to consider as an absolute promise that which he makes only on a condition. Then the plaintiff cannot recover against him, unless he can shew that the condition is fulfilled, by proving the defendant's ability to pay in such case; there is nothing which intimates that he may not declare generally on the subsequent promise. When the condition is fulfilled, the defendant becomes simply liable. So, in the case of *Haydon v. Williams*, I find the Court of Common Pleas expressly guarding against their giving an opinion that the plaintiff could not have recovered, in case he should have shewn that the defendant was liable to pay. The Court says: "The promise here is guarded with a condition; and it is sufficient to say there is no proof of the defendant's ability, so as to satisfy the condition, and make the conditional promise an absolute one." The Courts, therefore, do not mean to intimate that, the condition being performed, so as to make the promise an absolute one, the plaintiff could not have declared in the ordinary way. There are cases in which this point has occurred, in which the plaintiff has been permitted to recover upon a

(a) 6 B. & C. 609.

declaration in the ordinary form, without stating any conditional promise. One of these cases is *Thompson v. Osborne* (a), and another is *Davies v. Smith* (b), where Lord *Kenyon* intimates that, in order to proceed upon such a promise, the plaintiff must prove that the defendant was of ability, and may then recover upon a declaration stating an absolute promise to pay. On these grounds it seems to me that the plaintiffs are entitled to recover. I think there was a binding engagement between the parties, and a promise on the part of the defendant, for a new consideration, in the event of the instalments not being paid. That promise became absolute in the month of September 1830; that is within the six years, that would sustain the promise in the declaration, and that we must take as being a promise to pay according to the tenor and effect of the notes.

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For these reasons I am of opinion this rule should be discharged.

ALDERSON, B.—I am entirely of the same opinion. It seems to me that there was a contract for a new consideration in 1827, which was not fulfilled in the year 1830, when the instalments ceased to be paid; then there was nothing more remaining of the contract, but the simple duty of paying the promissory notes. On the part of Mr. Veitch, all we know is, that there has been an agreement, and he had nothing more to do than to perform his part of it, which was to pay the promissory notes then in existence; and it is not only a contract within the six years, but a contract within the six years properly stated upon the record. Then the Statute of Limitations is no answer to a breach of the contract so properly stated upon the record. Upon these grounds I concur entirely in the judgment of the Court.

(a) 2 Stark. N. P. C. 98.

(b) 4 Esp. 36.

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GURNEY, B.—In 1827, the defendant, who was residing abroad, being indebted to the plaintiffs, in order to gain time, engages to do certain things. In the first place he engages to set apart a portion of his consular salary; in the next place he apports the proceeds of certain wines then in India; and in the third place Mr. Cock is to give his acceptance for 245*l*. The plaintiffs were willing, on these conditions, to abstain from exercising their right of suing; but they stipulate that in case of his failing in these conditions, they shall be remitted to their original right: that failure did take place three years after, in the September of 1830, by the non-payment of the third instalment of 300*l*., and then the plaintiffs were put in the same situation as they were on the 1st of October 1827. It follows upon this that the action is brought in due time.

Rule discharged.

CATHERINE ROBINS, Executrix of THOMAS ROBINS, *v.*
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The attorney in a cause is not personally liable to a witness whom he subpoenas to give evidence in a cause, for his expenses of attendance.

THIS was an action against the defendant, an attorney, to recover the amount of the expenses incurred by the plaintiff's testator in attending to give evidence pursuant to a subpoena served on him by the defendant, in a cause of *House v. Leakey*, tried at the Taunton Spring Assizes in 1830, in which the defendant was attorney for the then defendant. The defendant paid the sum of 3*l*. into Court to cover certain charges in the bill of particulars for postage of letters, &c., and pleaded non-assumpsit as to the residue. It appeared, on the trial before the undersheriff of Somersetshire, that the subpoena served on the defendant stated the name of the cause, but did not state for which party the plaintiff was required to give evidence, the blank for the word "defendant" not being filled up.

The plaintiff proved his attendance pursuant to the subpoena, and had a verdict for 10*l.* damages, subject to a motion for a nonsuit, on the ground that the defendant was not liable in law, but that the action ought to have been brought against the party in the cause on whose behalf the evidence was given.

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In Michaelmas Term, 1836, a rule nisi for a nonsuit was obtained accordingly, against which, in Easter Term,

Erle and Bere shewed cause.—The authorities shew, that if by the known course of business it appears that the attorney means to make himself liable, even though he expressly contracts as attorney, he is personally liable: *Ex parte Hartopp* (a), *Foster v. Blakelock* (b). Suppose the party in the cause, when he employs the attorney, advances money to pay the whole outlay, is the witness to sue the party, and not the attorney, who, as against his client, ought to have paid the witness beforehand? It would be hard upon the party if the witness might turn round upon him and refuse to give his evidence in such a case. And the attorney may in all cases, if he thinks fit, obtain advances from the client sufficient for the conduct of the cause; *Vansandau v. Browns* (c); or he may state in express terms that he contracts only as agent, and that the witness is to look to the party himself. In *Hallett v. Mears* (d), where the party was held liable to the witness, there was evidence of an express promise by the defendant to pay him his expenses. *Bowles v. Johnson* (e) was the case of an attachment, and does not therefore bear upon the present. It has been held that an attorney may charge in his bill of costs for money paid to a stationer for the preparation of briefs: *Wildbore v. Bryan* (f). The

(a) 12 Ves. 349.

543.

(b) 5 B. & Cr. 328; 8 D. & R.

(d) 13 East, 15.

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(e) 1 Bla. 36.

(c) 9 Bing. 402; 2 M. & Scott,

(f) 8 Price, 677.

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service of the subpoena is equally for the benefit of his client. The attorney is *prima facie* liable. This was, in truth, in the nature of a contract with an agent who does not disclose the name of his principal, inasmuch as the subpoena did not state for whom the party was to attend. It is consistent with the client's being ultimately liable that the attorney should be primarily so.

Sir *W. Follett*, and *Bompas*, Serjt., *contra*.—It is clear the plaintiff knew that the defendant was attorney for the party for whom he attended and gave the evidence: the argument, therefore, that this is the case of an undisclosed principal, has no application. The question then is, does an attorney, when he undertakes a cause, undertake to expend everything necessary for the conduct of it, and to look to the client for re-payment? It is submitted that is not the law. Originally, an attorney had no connexion with the courts, but was merely an agent, appointed by another party to act or appear for him. The word attorney (*attornatus*) signifies no more. By the statute 4 Hen. 4, c. 18, attorneys were brought under the control of the courts; but that statute imposed no personal responsibilities upon them; and the effect of all later statutes has been only to place them under certain restraints, but not to affect their responsibilities to individuals. In their very character they are agents, and not principals; and all the proceedings are still conducted in the name of the party. The subpoena itself would be bad if it were not to appear in a given cause, and for a particular party. No doubt, the attorney may act on his own account, and make himself personally responsible; and the question in all the cases has been, whether he actually intended to undertake personally. They shew, that unless he does so undertake, he is not liable. Here there is nothing beyond the mere fact of his subpoenaing the witness, which is strictly part of his duty as agent. The at-

torney has a known profit for drawing the briefs; of course, therefore, he must pay the stationer. The preparation of the brief includes the paper, the writing, &c.; he undertakes, therefore, to provide these materials, as means whereby to receive that profit. He does not act as an agent in purchasing those articles, but buys them for himself, as subsidiary to his own profit. The same observation applies to the agent in town; he is the sub-agent of the attorney in the country, and represents him only; the latter makes the same charges against his client which the agent makes against him. This, also, is an employment subsidiary to that of the attorney in the country. The case of *Scrace v. Whittington* (a) falls within this principle. *Foster v. Blakelock* and *Ex parte Hartopp* are cases where the attorney made himself expressly liable. If, indeed, the attorney undertakes all the business of the suit, and agrees to pay all the money, and to look to his client, he makes himself a *principal*, and is liable to all the parties with whom the sub-contracts are made. *Hallett v. Mears* is an authority in favour of the defendant. The only question there was, whether the party was liable, when the witness went to the trial, but gave no evidence: but there was no suggestion that the attorney was liable. In *Hartop v. Jukes* (b), and *Hart v. White* (c), it was held, that the solicitor under a commission of bankruptcy is not liable in the first instance to the messenger whom he nominates, because the messenger knows that he is not a principal. In *Burrell v. Jones* (d), the attorneys of a bankrupt tenant were held personally liable on a written undertaking given by them, "as solicitors to the assignees," to pay the landlord his rent. But if an attorney were *prima facie* liable, the cases decided on special grounds never could have arisen. [*Alderson, B.*—You

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(a) 2 B. & C. 11; 3 D. & R. 195.

(b) 2 M. & Scott, 438.

(c) Holt, N. P. C. 376.

(d) 3 B. & Ald. 47.

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do not advert to the class of cases by which an attorney is bound to go on with the cause. *Parke*, B., referred to *Harris v. Osbourn* (a). His lordship stated also, that a case similar to the present was tried before him in 1832, in which he nonsuited the plaintiff, and the case was not moved.]

Cur. adv. vult.

In the present term, the judgment of the court was delivered by

LORD ABINGER, C. B.—The question in this case is, whether an attorney, who has caused a witness to be subpœnaed, without any express contract, and without any circumstances from which a special contract can be inferred, is liable to be sued by the witness for his expenses at the trial. The importance of the question induced the Court to take some time for consideration, as no instance has yet occurred of any decision in banc, as far as we are informed, though there was a case of a somewhat similar complexion to this tried before my Brother *Parke*, who nonsuited the plaintiff, at Guildhall, but it was never brought before the Court. In the case of *Hallett v. Mears* (b), which was an action by a witness against the party, there was evidence of a promise by the defendant when the subpœna was served. In the case of *Scrace v. Whittington* (c) and *Jones v. Brown* (d), which were actions by one attorney against another attorney for business done at his request, there was evidence of a course of dealing, and of usage, from which a contract was inferred. This is the first case in which the question has arisen, whether there is an implied contract to pay the expenses of a witness, by the attorney or agent by whom he

(a) 2 C. & M. 629.

(b) 13 East, 15.

(c) 2 B. & C. 11.

(d) 5 B. & C. 208.

has been subpoenaed. It is sufficient for the decision in this case to say that there is no implied contract by the attorney to pay the witness. The attorney is known merely as the agent—the attorney of the principal, and is directed by the principal himself. The agent, acting for and on the part of the principal, does not bind himself, unless he offers to do so by express words; he does not make himself liable for any thing, unless it is for those charges which he is himself bound to pay, and for which he makes a charge. If therefore he employs a stationer to do anything for which he makes a charge, he is liable, as he is for the fees of the officers of the Court; for these are ready-money transactions, for which the person engaged in the business of the Court is liable; for it cannot be presumed that the client would authorize him to pledge his credit where no credit is given. It is known the marshal does not receive his fees from the party, but on the contrary from the attorney, who is daily practising there, and who is bound to pay, and not his client. But in the case of a witness, it is different; he has no course of dealing with the attorney; he knows it is for the party that he is to give evidence; his obligation is to the party, and if he fails to attend, it is to the party's loss. By the 5 Eliz. c. 9, s. 12, he may demand a reasonable sum for his expenses before he leaves home, if he lives at a distance, or on his subpoena being served, and he may refuse to attend unless those expenses are paid; and if he is unwilling to accept the undertaking of the party, he may waive his right on receiving an undertaking from the attorney; but if he does not get it before the trial, or gives his evidence in Court without the undertaking, no contract can be implied afterwards by the agent, who has no interest in his attending, and can make no professional charge for what may be called his expenses. Therefore, as it must be presumed that the parties are aware of the law which obliges the party in the cause to furnish the witness with

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his expenses, either to be paid at the time of serving the subpoena or before he leaves home, if without this he chooses to give his evidence, there is nothing to bind the attorney, either express or implied. On these facts we think there is no implied contract, and the rule ought to be discharged.

Rule discharged.

ROBERTS v. HUMBY.

The Bath Court of Requests has no jurisdiction over a claim made by a voter against an objector, for compensation for loss of time in attending the Revising Barristers' Court on a notice of objection.

Where the want of jurisdiction appears on the face of the process, the Court will grant a prohibition after sentence.

Semble, that it will also grant it, though the want of jurisdiction does not so appear, when the party has had no opportunity of applying earlier to the superior court, and has not acquiesced in the proceedings.

ON a former day in this term, a rule had been obtained by *Kelly*, calling upon the Commissioners of the Court of Requests for the city of Bath to shew cause why a writ of prohibition should not issue to the said commissioners, prohibiting them from proceeding in the above cause in the said Court of Requests. It appeared from the affidavit on which the rule was obtained, that Humby was a householder of Bath, and that his name was on the list of persons entitled to vote in the election of members of Parliament for the city of Bath; and that he had objected to the name of Roberts being retained on the same list of voters, by virtue of the 2 & 3 Will. 4, c. 45; that Roberts attended before the revising barristers at their court, when the objection was disallowed, and his name retained on the list. The affidavit then stated, that on the 7th of October last a summons, of which the following is a copy, was left at his house in Avon-street: "To James Humby, Avon-street, yeoman." [After setting forth the title of the court, it proceeded,] "You are hereby summoned personally to appear before the Commissioners of the said Court, to be held on Wednesday the 11th of October instant, precisely at ten o'clock in the forenoon, in the Guildhall of the city of Bath, to answer a demand made against you by William Prowling Roberts, for the sum of 10s., for attendance on the 2nd day of October instant, on your notice, at the Revising Barristers' Court, and not to

depart from the said Court without leave : hereof fail not. Dated the 7th day of October, 1837." The affidavit further stated, that the matter came on for hearing at the Guildhall, on Wednesday the 18th of October, when the defendant Humby attended, and objected to the jurisdiction of the Commissioners: that, after much discussion, a majority of the Commissioners ultimately decided that they would take cognizance of the case, and adjudged in favour of the plaintiff's claim; and that on the 20th of October, the following order was delivered to Humby:

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" To James Humby, Avon-street, yeoman,

" Between { William Prowling Roberts, plaintiff,
and
James Humby, defendant.

" At the Court of Requests for the city of Bath and the liberties thereof, &c," [setting forth the title of the Court,] " held on Wednesday, the 18th day of October, 1837, in the Guildhall of the city of Bath. It was ordered that the defendant do pay to the plaintiff the sum of ten shillings for his debt, with the further sum of three shillings and five-pence for his costs adjudged to him in this cause, on or before Monday, the 20th day of November next; and upon failure of making such payment, execution will be awarded for the said debt and costs, together with further costs."

Against the above rule—

The *Attorney-General* now shewed cause.—This prohibition ought not to issue, on two grounds: First, an application cannot be made for a prohibition after sentence, unless the want of jurisdiction appears on the record of the sentence. 2ndly, the Bath court of Requests had jurisdiction in the present case. First, no want of jurisdiction appears here upon the face of the summons and sentence, (which must be taken together), and therefore

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the application is too late: *Ricketts v. Bodenham* (a). The general rule of law is there stated, and the cases collected in the argument (b), that, sentence having been pronounced, no prohibition can issue, unless upon the face of the proceedings there be no jurisdiction. There is no exception to that rule. By the Bath Court of Requests Act, 45 Geo. 3, c. 67, [local and personal, public,] that court has cognizance in all actions of debt. It may be said that this is not a debt. The summons is "to answer a demand against you by W. P. Roberts, for the sum of 10*s.* for attendance on the 2nd day of October instant, on your notice, at the Revising Barristers' Court." The sentence is distinctly for a debt. It says, "It is ordered that the defendant do pay to the plaintiff the sum of 10*s.* for his debt, and 3*s.* 5*d.* for his costs." If it had appeared clearly from the summons that it was not a debt, then it might be said, that though the sentence stated it to be a debt, yet the other proceedings shewed it was not. But what is stated on the summons may well be a debt, for it may be taken that Roberts had attended as a witness, and claimed 10*s.* as a remuneration for his loss of time; therefore it might well be for a debt; and coupling the sentence with the summons, that shewed it was for a debt, and therefore that the Court had jurisdiction. Then, is there any distinction between the Bath Court of Requests and any other inferior court? In *Poe's case* (c), it was held that a prohibition could not issue to a court-martial, after its sentence had been ratified by the King, and carried into execution. [Lord Abinger, C. B.—The principle of the rule seems to be this,—that if you wait and take the chance of a sentence in your favour, you cannot afterwards object to the jurisdiction, unless it appears on the face of the proceedings that the Court had no jurisdic-

(a) 4 Ad. & Ellis, 433; 6 Nev. & Man. 170.

(c) 5 B. & Adol. 681; 2 Nev. & M. 636.

(b) 4 Ad. & Ellis, 436.

tion. *Alderson, B.*—If the superior courts have jurisdiction to restrain the proceedings of inferior courts, there must of necessity and common sense be some power to restrain the inferior courts from proceeding upon a sentence passed when the superior courts are not sitting, and when no application can be made to them; otherwise they might commit any injustice, however great, and could not be stopped or prevented from doing so.] There is no distinction whether the cause is commenced and prosecuted in or after term; and the rule is express, that after sentence there can be no prohibition, except where the want of jurisdiction appears on the face of the proceedings.

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Secondly, this Court had jurisdiction. This case is clearly distinguishable from *Soames v. Rawlings (a)*, for this Bath Court has a more extensive jurisdiction than the Westminster Court of Requests. The facts in that case were nearly similar to the present, and it was there decided that no *debt* was incurred in such a case. [Lord *Abinger, C.B.*—The Court were of opinion in that case that you could not turn that which might be the subject-matter of an action of tort into a debt.] The plaintiff here applies for a compensation for loss of time, and though this may not be considered strictly as a debt, yet it is a cause founded on a quantum meruit, and is within the provisions of this act. It must be admitted that this act, 45 Geo. 3, c. 67, is very loosely drawn, but the words of it are large enough to embrace this question. By the 16th section the commissioners have power to determine all disputes and differences between party and party, for any sum not exceeding 10*l.*, “*in all actions or causes of debt*, whether such debts shall arise from any bond, bill, or specialty for payment of money only, or any promissory note or inland bill of exchange, or for rent upon leases, articles, minutes;

(a) 2 C. M. & R. 744.

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and in all causes of assumpsit and insimul computasset; and in all causes or actions of trover and conversion, and in all causes or returns (a) founded upon a quantum meruit; and in all causes or actions of trespass or detinue for goods and chattels taken or detained." So that the words are very extensive, and give jurisdiction—first, in actions of contract—then in actions of tort—then in actions of trespass or detinue. [Lord Abinger, C. B.—No action of tort is mentioned except trover and conversion.] This is a cause of action founded on a quantum meruit. The 17th section illustrates the meaning of the 16th, in setting forth the cases which are not included in the act, such as where the title to any lands, or on any debt where the title of the freehold or lease for years shall come in question, &c.; but the cause of complaint now under consideration is not excluded. There is also another section, which is important as shewing that the proceedings in the Court below are final, and cannot be removed, and will prevent this Court from interfering. The 47th section enacts, that no action or suit which shall be commenced or prosecuted in the said Court of Requests shall be removed into any superior court by certiorari or any other writ or process whatsoever, "but every such decree and judgment shall be final and conclusive between the parties to all intents and purposes whatsoever." If the Court below has acted corruptly, the proper remedy is a criminal information; but if they are acting bonâ fide, this Court has not power to interfere with them, unless they inquire concerning demands exceeding ten pounds.

Kelly, contra, was stopped by the Court.

LORD ABINGER, C. B.—This case has been very ingeniously argued, but I am of opinion that the rule for a

(a) So in the Act: it must be a misprint for "actions."

prohibition must be made absolute. In the first place, a comparison was made between this case and the proceedings in *Ricketts v. Bodenham* (a) in the Ecclesiastical Courts; but that case is not analogous, as there the Ecclesiastical Court not only had jurisdiction, but it was confined to their jurisdiction. It has no analogy to the case of an inferior court. In inferior courts a jurisdiction must be shewn, it will not be presumed: 2 Bac. Abr. Courts, D. 3 & 4. Here, upon the face of the proceedings, there is a want of jurisdiction. The summons states no other foundation for a claim of debt than that Roberts attended before the revising barrister, in consequence of a notice that his vote would be disputed. The attendance upon that notice does not constitute a debt. Then, does the act of Parliament extend to this case? It must be construed strictly, as it gives powers to a court of inferior jurisdiction. We cannot give to the words of the 16th section the sense contended for. I cannot pretend to say what is the meaning of the words in the latter part of the clause as to the quantum meruit. It is enough to say that they cannot be construed into an action of debt for attending before the revising barrister, though the parties be vexatiously taken there. Next, it is said that, by the 47th section, their jurisdiction is final, and our power of interference is taken away; but the jurisdiction of the superior courts cannot be taken away without express words. That section says there shall be no certiorari; but that does not apply to cases of prohibition, which is not to remove the cause, but to restrain the inferior court from proceeding. It therefore is not necessary to decide whether an application after sentence is too late, unless a defect in the proceedings appears upon the face of the sentence, as here we are clearly of opinion that a want of jurisdiction does appear.

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PARKE, B.—I entirely agree in opinion with the Lord Chief Baron that the rule must be absolute, on the ground that, connecting the summons with the sentence, a want of jurisdiction appears. If it had not, I should have wished to consider the question, whether this Court could interfere after sentence. In *Buggin v. Bennett* (a), Lord Mansfield says: "If it appears upon the face of the proceedings that the Court below have no jurisdiction, a prohibition may be issued at any time either before or after sentence; because all is a nullity; it is *coram non judice*. But where it does *not* appear upon the face of the proceedings, if the defendant below will lie by, or suffer that Court to go on under an apparent jurisdiction, as upon a contract made at sea, it would be unreasonable that this party, who, when defendant below, has thus lain by and concealed from the Court below a collateral matter, should come hither after sentence against him there, and suggest that collateral matter as a cause of prohibition, and obtain a prohibition upon it, after all this acquiescence in the jurisdiction of the Court below." It is put entirely on the ground of acquiescence. If it had been necessary, I should have wished to consider whether a party is to be bound by the judgment of an inferior court, where he has had no opportunity to dispute its jurisdiction; but here it appears the Court had no jurisdiction over a claim of this kind, which is not within either of the classes of action set forth in the 16th section.

BOLLAND, B., concurred.

ALDERSON, B.—I am of the same opinion. It is quite clear upon the face of the proceedings, that there was a want of jurisdiction. If it had not, I own I should have

(a) 4 Burr. 2037.

thought, under the circumstances of this case, that this court would have had a right to interfere. I think a writ of prohibition may be granted even after execution. All the cases where it has been held otherwise will be found to have turned on the acquiescence of the party. In Coke's Inst. title Articuli Cleri (a), the objection is thus stated: "As touching the time when prohibitions are granted, it seemeth strange to us that they are not only granted at the suit of the defendant in the Ecclesiastical Court after his answer, (whereby he affirmeth the jurisdiction of the said court, and submitteth himself unto the same), but also after all allegations and proofes made on both sides, when the cause is fully instructed and furnished for sentence; yea, after sentence, yea, after two or three sentences given, and after execution of the said sentence or sentences, and when the party for his long continued disobedience is laid in prison upon the writ of *excommunicato capiendo*." And then the answer is, "Prohibitions by law are to be granted at any time to restrain a court to intermeddle with or execute any thing, which by law they ought not to hold plea of: and they are much mistaken that maintain the contrary." And again, "And the king's courts that may award prohibitions, being informed, either by the parties themselves or by any stranger, that any court, temporal or ecclesiastical, doth hold plea of that (whereof they have not jurisdiction), may lawfully prohibit the same, as well after judgment and execution as before."

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Rule absolute.

(a) 2 Coke's Inst. 602.

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CARTER v. SOUTHALL.

Upon an interlocutory judgment against three joint makers of a promissory note, service of the rule nisi on two of them is sufficient, where the plaintiff is unable to serve the three.

CROMPTON moved, on an affidavit of service, to make absolute a rule to compute principal and interest on a promissory note. The judgment was against three joint makers of a promissory note; the plaintiff had only been able to serve two of them with a copy of a rule nisi; but a copy had been left at the last place of abode of the other defendant. He contended that this was sufficient, and compared it to the case of a declaration in ejectment, where service on one of two joint-tenants had been held sufficient (a).

ALDERSON, B.—I think that is enough for a rule absolute against the three.

Rule absolute.

(a) See *Doe d. Williamson v. Roe*, 10 Moore, 493; *Anon.* 1 Chit. 121; *Anon.* Loft, 301.

DEBENHAM and STORR v. CHAMBERS.

The declaration stated that the defendant was indebted to the two plaintiffs and one M. in his lifetime for money found to be due from the defendant to the plaintiffs and M. on an account stated between them, laying the promise to the plaintiffs and M. in his lifetime. Breach, that the defendant hath disregarded his promise, and

ASSUMPSIT.—The declaration stated that the defendant was indebted to the plaintiffs and to one Machin, in his lifetime, for the price and value of certain goods sold and delivered by the plaintiffs and Machin to the defendant, and in 50*l.* for money found to be due from the defendant to the plaintiffs and Machin, on an account then and there stated *between them*: and that the defendant afterwards, on &c., in consideration of the premises &c., then and there promised to pay the said several monies respectively to the plaintiffs, and to the said Machin in his lifetime, on request; yet he hath disregarded his promises, and hath not paid any of the said monies, or any part thereof, &c. Special demurrer and joinder.

"*hath not paid* any of the said monies, or any part thereof:"—*Held*, first, that the accounting was sufficiently shewn to have been between the defendant and the plaintiffs, and not between the plaintiffs only; 2ndly, that the breach was sufficient.

Platt, in support of the demurrer.—First, the allegation that the defendant was indebted for money found to be due on an account stated *between them*, is not sufficient: it is quite consistent with that statement that the account should only have been stated between the plaintiffs themselves and Machin. The count ought to have alleged the account to have been stated *by and between them*. In *Hooper v. Vestris* (a), an affidavit of debt, stating the defendant to be indebted to the deponent "on an account stated between them," was held insufficient. [*Alderson*, B.—The declaration pursues the form given for the account stated in the new rules of T. T. 1 Will. 4.] The word "them" leaves it equivocal between whom the account is stated. The second objection is to the breach. The allegation is, that the defendant "has not paid the said monies or any part thereof," which is too general, and only denies the payment to the parties mentioned. It can only be co-extensive with the promise, which is, that the defendant will pay Debenham, Storr, and Machin, who were the three partners. It is quite consistent that the defendant, although he has not paid the three partners, may have paid the two survivors, which is not negatived. [*Parke*, B.—The breach, too, is in the form given by the new rules.] That is only to be followed where there is one plaintiff and one defendant.

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PER CURIAM.—We think there is nothing in either of the objections. We cannot assent to the case that has been cited. There is certainly no ground for saying that greater strictness is required in an affidavit of debt than in the forms of pleading laid down by the Judges. The word "indebted" seems to have been quite overlooked in that case.

Judgment for the plaintiff.

The Court refused leave to amend.

(a) 5 Dowl. P. C. 710.

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NICKISSON and Another, Assignees of THOMPSON,
a Bankrupt, v. TROTTER.

Trover for certain gold and silver watches. Plea, that the defendant was a pawnbroker, and that they were deposited with him as pledges and security for a sum of money advanced, and which had not been repaid. Replication, that before they were so pledged, it was corruptly agreed that the defendant should lend and advance to the plaintiff a sum exceeding 10*l.*, to wit, 77*l.* 11*s.* 7*d.*, and that defendant should forbear and give day of payment thereof to the plaintiff until the expiration of one year next after such loan and advancement, and that plaintiff for such loan &c. should give more than lawful interest, &c.; and that for

TROVER against the defendant, a pawnbroker, for certain gold and silver watches, and other property; the first count laying the property to be in the bankrupt; the second laying the property in the assignees.

Pleas—First, not guilty. Secondly, to the first count, a denial of the possession of the bankrupt. Thirdly, to the second count, a denial of the possession of the assignees. On these pleas issues were joined. The fourth plea was to the first count, (so far as related to some of the watches), that the defendant was a pawnbroker, and that Thompson, before he became a bankrupt, to wit, on &c., deposited the said watches with the defendant to be kept as pledges and security, as well for the repayment of 93*l.* 11*s.* 7*d.* then lent and advanced to Thompson on the deposit and security of the said watches, as for the payment to the defendant of certain interest by the said Thompson then agreed to be paid to him, upon and for the loan and forbearance of the said monies so lent and advanced: and that when Thompson became bankrupt, and from thence hitherto, the said principal sum and interest were due and owing to the defendant. The fifth plea, which was to the second count, was similar to the fourth, and related to the remainder of the watches. Replication to the fourth plea, as to five gold and seventeen of the twenty-nine silver watches therein mentioned, that before they were so pledged and deposited with the defendant to

securing the repayment of the sum, with interest, the plaintiff should pledge the watches with defendant: that in pursuance thereof the watches were deposited and the money advanced, and the interest agreed to be paid exceeded the rate allowed by law, whereby the agreement was wholly void. Issue thereon. At the trial it was proved that the watches were deposited, but that no agreement was made as to the time they should remain in pledge. The Judge, upon application, amended the record by inserting, after the words "until the expiration of one year after such loan," the words "*redeemable in the meantime.*" The plaintiff having recovered a verdict:—*Held*, on motion to enter a nonsuit, that this was a contract within the Pawnbrokers' Act, and that it was to be assumed from the circumstances that the plaintiff had dealt with the defendant in the character of, and upon the usual terms of dealing with, a pawnbroker.

be kept &c., to wit, on the 2nd day of May 1835, being one of the days and times in the said fourth plea mentioned, it was corruptly and against the form of the statute agreed by and between Thompson and the defendant, that the defendant should lend and advance to Thompson a certain sum exceeding 10*l.*, to wit, 77*l.* 11*s.* 7*d.*, and that the defendant should forbear and give day of payment thereof to Thompson *for a certain time, to wit, until the expiration of one year next after the making such loan and advancement*; and that the said Thompson, for the loan and advance of the said sum, and for giving day of payment thereof, for each and every calendar month the same should be forborne payment by the defendant, should pay to the defendant more than lawful interest at and after the rate of 5 per cent. per annum, on each and every twenty shillings of the said sum so lent and advanced as aforesaid, —that is to say, the sum of three pence; and that for securing the repayment of the said sum, with interest as aforesaid, Thompson should pledge the said watches with the defendant. It then stated, that in pursuance of the agreement, the watches were deposited and the money advanced, and that the interest agreed to be paid by the defendant exceeded the rate allowed by the act of parliament, whereby the agreement was wholly void. There was a similar replication as to the remainder of the watches in the fourth plea mentioned; and also a similar replication to the fifth plea. The rejoinder took issue on the replications to the fourth and fifth pleas.

At the trial before *Parke, B.*, at the Summer Assizes for the county of Northumberland, it appeared that the watches had been deposited by the bankrupt, from time to time, with the defendant, but that no agreement was made as to the time they should remain in pledge: and with regard to the largest quantity of them, that Thompson, at the time of depositing them, said that he should only require them to remain in pledge *a month or two*. Upon this evidence the counsel for the defendant applied

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for a nonsuit, on the ground that the replication was not proved, inasmuch as it alleged the agreement between Thompson and the defendant to be that the latter should forbear and give day of payment of the sums lent to Thompson for a certain time, to wit, *until the expiration of one year next after the making of such loan and advancement*; whereas the proof was, that no time at all for forbearance was mentioned. The plaintiff's counsel applied to the learned Judge to amend the record pursuant to the provisions of the 3 & 4 Will. 4, c. 42, s. 24, which he did, by inserting in the several replications, after the words "until the expiration of one year next after the making of such loan and advancement," the words "redeemable in the mean time." There was evidence that more than 5 per cent. had been received upon the loan. The jury having found a verdict for the plaintiffs,

Alexander now moved, pursuant to leave given for that purpose, to enter a nonsuit.—The evidence given did not prove the contract as laid. Instead of being a contract that the defendant should forbear for a year, as alleged, it was proved to be a general advance on the watches. It was nothing like a contract for forbearance for a year, and therefore not within the meaning of the Pawnbrokers' Act, 39 & 40 Geo. 3, c. 99, s. 17. [*Parke, B.*—Except that it was to be inferred that the watches were deposited with him in his trade of a pawnbroker. Mr. *Watson* applied to me to amend the replication, and I thought I had power to do so.] The amendment carried the case no farther; for, unless the defendant was also restricted from demanding repayment until the expiration of the year, the variance still remained. [*Lord Abinger, C. B.*—I think it must be assumed that the deposit was on the terms usual with pawnbrokers, and if so, that is an implied part of the contract. Would not the pawnbroker be liable to penalties in this case?] That depends upon whether it was or was not within the Pawnbrokers' Act; and upon the

face of the replication it did not appear to be within the act. It ought therefore to have been tried as an ordinary case of usury; and, in such a case, which is a penal action, the Judge ought not to have amended. But, without an amendment, it is clear that the plaintiffs cannot recover.

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LORD ABINGER, C. B.—The question for the jury was, whether the parties did not intend to apply all the terms of a pawnbroking contract, with the exception of the amount being beyond 10%.

PARKE, B.—It is clear the contract was meant to be on the usual terms of a pawnbroker. Until the amendment was made, it was indefinite on both sides, but it is now sufficient.

ALDERSON, B.—I think it reasonable to infer that Thompson dealt with the defendant as a pawnbroker.

Rule refused.

LEWIS v. PARKES.

DEBT by the assignee of a bail-bond.—The declaration, after setting forth the writ of summons, the arrest, the execution of the bail-bond, and the breach of it, in not putting in special bail, whereby the bond became forfeited, went on to allege that the sheriff, "at the request of the plaintiff, being the plaintiff in the said suit, by an indorsement on the said writing obligatory duly made, and sealed with the seal of office of the said sheriff, assigned the said writing obligatory to the said plaintiff, according to the form of the statute in such case made and provided."

In an action by an assignee of a bail-bond, the declaration stated that the sheriff, "by an indorsement on the said writing obligatory duly made and sealed with the seal of the officer of the said sheriff, assigned the said writing obligatory to the said plaintiff, according to the form of the statute:"—*Held*, on special demurrer, that the declaration was good, and that it was not necessary to state in the declaration that the assignment was under the hand of the sheriff, and executed in the presence of two witnesses.

Special demurrer, assigning for cause that it does not appear in or by the said declaration that the said sheriff

murrer, that the declaration was good, and that it was not necessary to state in the declaration that the assignment was under the hand of the sheriff, and executed in the presence of two witnesses.

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assigned the said writing obligatory to the said plaintiff in the presence of two credible witnesses, as required by the statute in such case made.

Mansel, in support of the demurrer.—The authority of the sheriff to assign a bail-bond is given by the statute 4 Ann. c. 16, s. 20, which enacts, “ that if any person shall be arrested by any writ, bill, or process issuing out of any of her Majesty’s courts of record at Westminster, at the suit of any common person, and the sheriff or other officer taketh bail from such person against whom such writ &c. is taken out, the sheriff or other officer, at the request and costs of the plaintiff in such action or suit, or his lawful attorney, shall assign to the plaintiff in such action the bail-bond or other security taken from such bail, by indorsing the same, and attesting it under his hand and seal, in the presence of two or more credible witnesses.” The authority being given by statute, its directions ought to be strictly pursued, and it ought to appear on the face of the declaration that they have been complied with. There are two objections to this declaration: first, that the assignment is not stated to be under the hand of the sheriff; and secondly, that it is not stated to have been attested in the presence of two witnesses. The case of *Mifflin v. Morgan* (a) is no authority in support of the declaration, since there the objection was taken on a writ of error, after a judgment by default; and the Court overruled it on the ground that the defect was aided after judgment by default, by the 4 Ann. c. 16, s. 2, as such defect would have been aided by a verdict. It may be inferred from the judgment in *Lease v. Box* (b), to have been the opinion of the Court, that though it is not necessary to set forth the names of the witnesses, or to make profert of the assignment, yet it must be shewn that the assignment was made in the mode directed by and according to the

(a) 2 Lord Raym. 1564.

(b) 1 Wils. 121.

words of the statute. This objection has never been taken on special demurrer; and it is submitted, that, if so taken, the allegation is insufficient.

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Hunfrey, contra.—The declaration is good. The case of *Dames v. Papworth* (a) is a decision expressly in point; though it may be admitted that the objection to the declaration must be taken to have been as if upon general demurrer; for the reasoning of the Court shews that it would have been good on special demurrer. The declaration stated that the defendant, “by a certain indorsement upon the bond, assigned the same to the plaintiff, according to the form of the statute in that case made and provided.” The first objection taken was, that the plaintiff had not set forth that the assignment was *under the hand and seal of the sheriff*, as it was expressly directed to be by the stat. 4 Ann. c. 16, s. 20; and that therefore he had not shewn enough to support his action. To which the Court say, “But we were all of opinion that there was no weight in either of these objections. As to the first, we thought this the best mode of declaring, though declarations sometimes are otherwise, because the plaintiff must prove, to shew that the assignment was according to the statute, that it was under the hand and seal of the sheriff.” And in a note to that case (b), Lord Chief Justice *Willes* says, “The same point has been ruled on another part of this clause in the act. Though the statute requires the indorsement to be made by the sheriff *in the presence of two witnesses*, it is not necessary to set out their names in the declaration stating the assignment, or even to state that it was indorsed in the presence of two witnesses;” and he cites *Robinson v. Taylor* (c), and *Lease v. Box*. And he adds: “It is suffi-

(a) *Willes*, 408.

(b) Page 409, note (a).

(c) Fort. 366; cited 1 *Wils.* 122,
nomine *Rollinson v. Taylor*.

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cient to state generally that the sheriff, at the request and costs of the plaintiff, assigned the bond to the plaintiff according to the form of the statute." In *Nightingale v. Wilcoxon* (a), it was held that in a declaration against a sheriff for an escape, it is sufficient to allege that the writ directing the arrest was *duly indorsed for bail*, without adding, "by virtue of an affidavit made and filed of record." That was upon a special demurrer; and there, *Bayley, J.*, in delivering the judgment of the Court, says: "We think this is sufficient, and that the writ, which is stated to have been prosecuted out of this Court, is not to be presumed to have issued improvidently. The presumption is the other way, and that all things have been done rightly, and all steps taken which are necessary by the practice of the Court, or the statute law regulating that practice, to the due issuing of the writ." There is no doubt that in almost all cases some matter besides that which is stated in the declaration must be proved, to entitle the plaintiff to recover; it is not necessary to state every minute ingredient necessary for that purpose.

LORD ABINGER, C. B.—The case cited from *Willes* is applicable to the present, since it is an express decision, that it is enough to say that the sheriff assigned the bond according to the form of the statute. The plaintiff must *prove* the assignment to have been made under the hand and seal of the sheriff, as well as that it was made in the presence of two credible witnesses.

PARKE, B.—I agree with the Lord Chief Baron. I think that the authority in *Willes* bears out the principle, that it is unnecessary to go into minute detail, where it is rather matter of evidence than allegation. If this objection were allowed, we might next be required in actions by as-

(a) 10 B. & C. 202; 5 M. & R. 169; 1 M. & P. 279; 4 Bing. 501.

signees of bankrupts to determine that the general statement of their title, "according to the form of the statute," is not sufficient, but that they must go into the particular mode of acquiring it.

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ALDERSON, B.—I am of the same opinion. The reason given for the decision in *Dawes v. Papworth* is, that the plaintiff must prove that he has done that which the statute requires, and that he cannot recover without such proof. If this objection were held to be good, we should overrule the only reason upon which that judgment is given.

GURNEY, B., concurred.

Judgment for plaintiff.

RATHBONE v. FOWLER.

HEATON, on a former day, obtained a rule to shew cause why the defendant should not be discharged out of custody under the 48 Geo. 3, c. 123. The original debt was under 20*l.*, but the defendant had given a cognovit for debt and costs, which together amounted to 55*l.*, and it was for this sum that he was now in execution.

Where a defendant had given a cognovit for debt and costs to an amount exceeding 20*l.*, though the original debt was under that amount, and had remained in execution for twelve successive calendar months:—*Held*, that he was entitled to be discharged out of custody under 48 Geo. 3, c. 123, the amount of costs being still costs within the meaning of that statute.

Humfrey shewed cause.—The statute 48 Geo. 3, c. 123, enacts, "That all persons in execution upon any judgment, in whatsoever Court the same may have been obtained, and whether such Court be or be not a Court of Record, for any debt or damages not exceeding the sum of 20*l.*, exclusive of the costs recovered by such judgment, and who shall have lain in prison thereupon for twelve successive calendar months next before the time of their application to be discharged as hereinafter mentioned, shall and may, upon his, her, or their application for that purpose in term time, made to some one of his Majesty's

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courts of record at Westminster, to the satisfaction of such Court, be forthwith discharged out of custody." In *Robinson v. Lundell* (a), and ——— v. *White* (b), it was held that a defendant who had given a warrant of attorney for debt and costs for an amount exceeding 20*l.*, though the original debt was less, was not entitled to be discharged under this statute. It is difficult to see any distinction between a warrant of attorney and a cognovit in this respect.

PARKE, B.—A warrant of attorney is to confess judgment for a debt and costs in another suit: but when a cognovit is given, as here, in the course of a cause, for debt and costs in that cause, the costs are still costs within the meaning of the act.

The rest of the Court concurred.

Rule absolute.

(a) 6 Moore, 287.

(b) 1 Dowl. P. C. 19.

WALLEN v. SMITH.

A cause was referred to arbitration, and by the order of reference, the party in whose favour the award should be made was to be at liberty to enter up judgment for the sum awarded, as if a verdict had been obtained. The arbitrator awarded a sum under 20*l.* :—*Held*, that the costs must be

ASSUMPSIT on a special agreement, to recover the sum of 40*l.*, with counts for work and labour, money paid, and on an account stated. The defendant pleaded non-assumpsit and a set-off, and paid the sum of 2*l.* into Court. The cause was referred to arbitration without a verdict being taken, but the order of reference contained a term, that the party in whose favour the award should be made should be at liberty to enter up judgment for the sum awarded, as if a verdict had been obtained. The arbitrator found in favour of the plaintiff for an amount under 20*l.* The Master on taxation had

taxed according to the reduced scale directed by the "Directions to Taxing Officers," H. T. 4 W. 4.

allowed costs on the higher scale applicable to causes for debts above 20*l*. *Platt*, on a former day, obtained a rule to shew cause why the Master should not review his taxation.

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Kelly now shewed cause.—This is not a case to which the Directions to Taxing Officers, H. T. 4 W. 4 (a), apply. The words of the directions are, “In all actions of assumpsit, debt, or covenant, where the sum *recovered*, or paid into court, and accepted by the plaintiff in satisfaction of his demand, or agreed to be paid on the settlement of the action, shall not exceed 20*l*. (without costs), the plaintiff’s costs shall be taxed on the reduced scale hereunto annexed.” The object of these directions was to compel a party to try his cause before the sheriff whenever he had the power to do so, by taking away the inducement of a more liberal allowance of costs on a trial before a judge. But that reason could not apply here, for the plaintiff was precluded, by the amount sought to be recovered, from trying his cause before the sheriff. Besides, the directions cannot have reference to a case like the present, where the matter is referred to arbitration, for here no sum has been “recovered,” as no verdict has been entered up. The term “recovered” must mean after a trial, when a judge might give a certificate for higher costs. The same word occurs in the 43 Geo. 3, c. 46, s. 3, and on that statute it has been decided, that if a defendant arrested for a certain sum pay a less sum into Court, which the plaintiff accepts in satisfaction, it is not a case within the statute: *Davey v. Renton* (b), *Rouvery v. Alefson* (c), *Butler v. Brown* (d). So also, it has been held that a sum awarded by an arbitrator is not “a sum recovered” within the meaning of the statute: *Keene v. Deeble* (e),

(a) 2 Dowl. P. C. 485.

(d) 1 B. & B. 66; 3 Moore, 327.

(b) 4 D. & Ry. 187; 2 B. & C.

(e) 3 B. & Cr. 491; 5 D. & R.

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(c) 13 East, 90.

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Sherwood v. Taylor (a). The term "recovered" cannot apply to any state of things, except where the sum is recovered on a trial before a court and jury. In *Holder v. Raitt* (b), the cause was referred to arbitration by a Judge's order, which directed that the costs of the suit, reference, and award should "abide the event in like manner as upon a verdict." The arbitrator awarded that the defendant should pay the plaintiff a sum less than that for which the defendant was arrested; and it was held that the Court could not give the defendant the costs of either the suit or the reference, under the 43 Geo. 3, c. 46, s. 3. That shews that the finding of an arbitrator is not equivalent to a verdict.

Platt, *contra*, was stopped by the Court.

LORD ABINGER, C. B.—I am of opinion that this must be treated as a recovery of less than 20*l.*, within the meaning of the Directions to Taxing Officers. The plaintiff has recovered less than that amount by some process or other. If the rule had contained no further words than were applicable to a recovery by verdict, I should have felt that the analogy to the cases on the statute 43 Geo. 3, c. 46, would have been very strong. But it goes on to provide that the same scale of taxation shall take place where a less sum than 20*l.* is "paid into Court and accepted by the plaintiff in satisfaction of his demand, or agreed to be paid on the settlement of the action," which shews that the word "recovery" is applied in a general sense, and means that if a party does not obtain more, as the fruits of his process, than 20*l.*, he will be allowed costs only according to the lower scale.

(a) 6 Bing. 380; 3 Moore & P. 461.

(b) 2 Ad. & Ellis, 445; 4 Nev. & Mann. 466.

PARKE, B.—I am of the same opinion. In general cases of reference to arbitration this decision will not operate as a hardship; because the parties may make it a term of the submission, that the arbitrator shall have, in this respect, the power of a Judge to grant a certificate. In this particular case the award operates strongly as a recovery, because the agreement of reference provides that the successful party should be at liberty to enter up judgment for the sum awarded.

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ALDERSON, B.—The direction to the taxing officers does not confine the reduced scale of allowance to those cases only which are triable before the sheriff, for actions of covenant are expressly mentioned. Then, to entitle a party to the higher rate of costs, he must shew that he has recovered more than 20*l.*; but the argument urged is, that he has recovered nothing at all.

Rule absolute—the taxation to be reduced
by the difference between the two scales.

TAYLOR v. MURRAY.

MILLER had obtained a rule to shew cause why the taxation of costs in this cause, together with the judgment and execution, should not be set aside for irregularity, on the ground that the plaintiff had not delivered a copy of the bill of costs, pursuant to the rule of this Court, M. T. 1 W. 4, s. 10. The judgment was upon demurrer.

A judgment on demurrer is not a rule, order, *town postea*, or *inquisition*, within the rule of the Exchequer, Mich. Term, 1 Will. 4, s. 10, which requires the delivery of a copy of the bill of costs before taxation.

Humfrey shewed cause.—The rule is, “That one day’s previous notice of the time of taxing costs, upon rules, orders, *town postea*s, and *inquisitions*, and a copy of the bill of costs, and affidavit to increase (if any), shall be given and delivered by the attorney or attornies of the

An omission to comply with the rule is no ground for setting aside the judgment and execution, but

only for a review of the taxation.

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party or parties whose costs are to be taxed, to the attorney of the other party or parties in the same action, at the time of service of such notice; and that in the cases of *postea* and inquisitions in country causes, the notice shall be given two days, and a copy and affidavit delivered two days, before such taxation." This being a judgment upon demurrer, no delivery of a bill of costs was necessary: that rule does not apply to such a case, for this is neither a rule, order, *postea*, nor inquisition. The case of *Wilkins v. Perkins* (a), where it was held that the delivery of a copy of the bill of costs under the rule was imperative, unless waived by the other party, is no authority in this case, as that was on a *postea*. [Parke, B.—The general rule of all the courts, T. T. 1 W. 4, s. 12, as to notice of taxing costs, was subsequent to the rule of this court, but does not appear to affect it (b). The decisions on that rule appear to have been, that the Court will not set aside the judgment and execution because no notice has been given (c).]

Miller, contra.—After the argument upon the demurrer in this case, the following order was made: "Upon hearing Mr. H., of counsel for the plaintiff, and no cause shewn, it is *ordered* that judgment be entered for the plaintiff." That is either a *rule* or an *order*; but if it be not within the precise words, it is within the meaning and the spirit of the rule of this Court.

Lord ABINGER, C. B.—That is not a rule or order within the meaning of the rule; it is merely giving judgment upon the demurrer: but if it were, it is no ground for setting aside the judgment. Upon the general rule of all the Courts, it has not been usual to set aside the judgment, but to have the taxation reviewed.

(a) 2 M. & W. 315; also reported 5 Dowl. 461, *nomine Wil-
son v. Perkins*.

(b) But see *Burch v. Poynter*,

Hil. T. 1838, post.)

(c) See *Perry v. Turner*, 2 Cr. & J. 89; *Routledge v. Giles*, Ibid. 163; and see note (a), 2 C. & J. 93.

PARKE, B.—The Courts do not set aside the judgment and execution for an omission to comply with the rule; but merely order the taxation to be reviewed.

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Rule for setting aside the judgment and execution discharged; the bill referred back to the Master, to see if any thing was overcharged; the plaintiff to refund, if he had allowed too much.

VAUGHAN v. GOADBY.

ON a former day in this term, *James* had obtained a rule to shew cause why the bail-bond should not be delivered up to be cancelled, on entering a common appearance. It appeared from the affidavits, that the plaintiff had arrested the defendant upon an affidavit of debt for 200*l.*, money lent and advanced. After the arrest, the defendant, upon an affidavit disclosing certain facts, had obtained a judge's order for arresting the plaintiff. The plaintiff afterwards applied to be discharged out of custody, and, in support of his application, made an affidavit which stated some facts apparently inconsistent with his claim for money lent. It appeared that an agreement had been made between the plaintiff and defendant, by which the defendant was to manufacture microscopes for the American market, and the plaintiff was to supply him with money to enable him to do so. The affidavit of the defendant stated that he had made the microscopes to a much larger amount than 200*l.*, which he admitted he had received from the plaintiff. The plaintiff admitted the contract, but denied that any microscopes had been delivered.

A defendant having been arrested on an affidavit of debt for money lent, afterwards, on an affidavit disclosing certain facts, obtained a Judge's order to arrest the plaintiff. The plaintiff applied to be discharged out of custody, and in his affidavit for that purpose admitted certain facts which appeared to be inconsistent with his claim for money lent. Under these circumstances, the Court refused an application for cancelling the bail-bond given by the defendant.

Erle shewed cause.—When a party is arrested on an

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affidavit which is good on the face of it, the Court will not subsequently inquire into the truth of it, and allow the merits to be tried upon counter-affidavits. In *Nixetich v. Bonacich* (a), the Court recognised the general rule, that they would not go into the merits of an arrest, upon affidavits.

James, contra, cited *Chambers v. Bernasconi* (b), and *Nixetich v. Bonacich*, to shew, that under special circumstances, the Court would interfere summarily and discharge the defendant out of custody.

LORD ABINGER, C. B.—If we were to allow this application, we should be doing that which would establish a very dangerous precedent. I should rather say, from what appears on these affidavits, that the plaintiff had arrested the defendant for a wrong cause of action. But, is the Court to try the merits of the original affidavit on that ground? If we were to do it in this instance, we should have motions every term to try the merits of the affidavit of debt.

PARKE, B.—I have felt some doubt in this case, because, taking the plaintiff's affidavit without the defendant's, it is clear that he had a right to arrest him for money lent and advanced; but, if taken in conjunction with the defendant's, then it shews that he had no right to hold the defendant to bail. That, however, is not sufficient to call upon us to interfere. I fully concur with what has been said by the Lord Chief Baron, that we should be establishing a dangerous precedent by granting this application.

BOLLAND, B.—I agree with the Lord Chief Baron. We should be trying actions for malicious arrest on motions of this kind.

Rule discharged, without costs.

(a) 5 B. & Ald. 904.

(b) 6 Bing. 499; 4 Moo. & P. 278.

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HOLTON v. GUNTRIP.

THIS was a sheriff's interpleader rule. It appeared from the affidavits that the sheriff had gone to the defendant's premises, in order to levy upon his goods under a fi. fa., but, on a claim being set up to them, had withdrawn from the premises without making any actual seizure.

R. Gurney, for the execution creditor, cited *Braine v. Hunt* (a), as an authority to shew, that, as the goods had never been actually in the sheriff's hands, he was not entitled to relief under the Interpleader Act.

Dowling, for the sheriff, contended that the 6th section of the act provided, not only for the case of goods actually seized, but also for the case where there had been an intention to take them in execution; the words being, "that, when any such claim shall be made to any goods or chattels taken, or intended to be taken, in execution under such process, &c., it shall and may be lawful to and for the Court from which such process issued, on application of such sheriff or other officer, made before or after the return of such process, and as well before as after action brought against such sheriff or other officer, to call before them by rule of court," &c. &c. So that the act enabled the sheriff to apply either where the goods were taken or intended to be taken, and either before or after the return of the process.

Lord ABINGER, C. B.—The sheriff withdrew on a claim being set up to the goods. He does not come to the Court, therefore, intending to take the goods; he has exercised his own judgment upon it, and forborne to take

The sheriff is not entitled to relief under the Interpleader Act, where, having gone to the premises of the defendant to take his goods under a fi. fa., he has withdrawn without seizing them, on notice of an adverse claim, and has not the goods in his possession when he applies to the Court.

(a) 2 C. & M. 418; 2 Dowl. P. C. 391: see also *Scott v. Lewis*, 2 C. M. & R. 289.

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apply to cases where the sheriff might obtain time to make his return.

PARKE, B., concurred.

ALDERSON, B.—The statute was framed to get rid of the difficulties that existed in affording the sheriff relief in a court of equity. But there is no instance of an interpleader, where the sheriff had not possession of the goods, and was therefore unable to deliver them either to one party or the other. How can we bar the claimant here, if he runs away with the property?

Rule discharged, with costs.

DIXON and Another v. FLETCHER.

Assumpsit.—The declaration stated that the defendant, carrying on business at Liverpool, sent and delivered to the plaintiffs, carrying on business at New Orleans, an

order to purchase cotton for the defendant, viz., if they, the plaintiffs, could purchase cotton at such price as to stand in, laid down in Liverpool, all charges included, Liverpool fair 9½d. per lb., good fair 10d. per lb., then the plaintiffs were to purchase cotton to the extent of 200 bales, and if at ¾d. per lb. under those prices, 300 bales; if at ½d. per lb. under those prices, 400 bales; and to draw bills of exchange on the defendant for the amount of the price. The declaration then averred that the plaintiffs accepted the order, and promised to perform all things therein contained to be by them performed, and in consideration of the premises the defendant promised to accept and receive the cotton to be purchased by the plaintiffs in pursuance of the order, and to accept any bill drawn by the plaintiffs on the defendant for the price of the cotton. The declaration then averred that the plaintiffs did purchase a large quantity, to wit, 206 bales of Liverpool fair cotton, at such a price as to stand in 9½d. per lb. laid down in Liverpool, all charges included: it then stated the shipping of the cotton, that the plaintiffs drew a bill for the amount, that afterwards, to wit, on &c., the said cotton arrived in Liverpool, and then was ready to be delivered to the defendant, of all which he had notice: and the plaintiffs afterward, to wit, on &c., requested the defendant to accept the said cotton, and to accept the said bill of exchange, which was then presented to the defendant for acceptance. Breach—that the defendant did not nor would accept the cotton so purchased, or any part of it, and did not nor would accept the bill, or pay or satisfy the plaintiffs for the said cotton:—*Held*, on demurrer, that the declaration was ill, as it did not sufficiently shew that the plaintiffs were ready and willing to deliver the 200 bales only.

ASSUMPSIT. The declaration stated, that, heretofore, to wit, on &c., the defendant, then carrying on business at Liverpool, in the county of Lancaster, sent and delivered to the plaintiffs, then carrying on business in parts beyond the seas, to wit, at New Orleans, in the United States of America, a certain order and direction to pur-

chase cotton for the defendant, that is to say, if they, the plaintiffs, could purchase cotton in parts beyond the seas, to wit, at New Orleans, in the United States of America, at such price as to stand in, laid down in Liverpool, freight, duty, and every charge included, both in Liverpool and also in parts beyond the seas—Liverpool fair, $9\frac{1}{4}d.$ per lb., good fair, $10d.$ per lb.—then the plaintiffs were to purchase cotton to the extent of two hundred bales; and if at one farthing per lb. under the prices aforesaid, then the plaintiffs were to purchase three hundred bales; if at one halfpenny per lb. under the prices aforesaid, then the plaintiffs were to purchase four hundred bales; and to draw bills of exchange on the defendant for the amount of the price of the cotton so purchased as aforesaid, together with the charges of the custody and shipment thereof, and a reasonable commission to the plaintiffs on the purchase thereof; and the plaintiffs accepted and received the said order and direction, and promised to perform and fulfil all things therein contained to be by them performed and fulfilled; and in consideration of the premises the defendant promised to accept and receive, at Liverpool aforesaid, the cotton to be purchased by the plaintiffs in pursuance of the said order, and to accept any bill of exchange drawn by the plaintiffs on the defendant for the amount or price of the said cotton, together with the charges on the custody and shipment thereof, and a reasonable commission to the plaintiffs on the purchase thereof; and the plaintiffs in fact say, that, afterwards, and before the commencement of this action, to wit, on &c., they, the plaintiffs, did purchase in parts beyond the seas, to wit, at New Orleans aforesaid, a large quantity, to wit, two hundred *and six* bales of Liverpool fair cotton, at such a price as to stand in $9\frac{1}{4}d.$ per lb. laid down in Liverpool aforesaid, in the county aforesaid, freight, duty, and every charge included, both at Liverpool aforesaid and in parts beyond the seas; and the plaintiffs, afterwards, to wit, on the day and year last aforesaid, shipped

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chase cotton for the defendant, that is to say, if they, the plaintiffs, could purchase cotton in parts beyond the seas, to wit, at New Orleans, in the United States of America, at such price as to stand in, laid down in Liverpool, freight, duty, and every charge included, both in Liverpool and also in parts beyond the seas—Liverpool fair, $9\frac{1}{4}d.$ per lb., good fair, $10d.$ per lb.—then the plaintiffs were to purchase cotton to the extent of two hundred bales; and if at one farthing per lb. under the prices aforesaid, then the plaintiffs were to purchase three hundred bales; if at one halfpenny per lb. under the prices aforesaid, then the plaintiffs were to purchase four hundred bales; and to draw bills of exchange on the defendant for the amount of the price of the cotton so purchased as aforesaid, together with the charges of the custody and shipment thereof, and a reasonable commission to the plaintiffs on the purchase thereof; and the plaintiffs accepted and received the said order and direction, and promised to perform and fulfil all things therein contained to be by them performed and fulfilled; and in consideration of the premises the defendant promised to accept and receive, at Liverpool aforesaid, the cotton to be purchased by the plaintiffs in pursuance of the said order, and to accept any bill of exchange drawn by the plaintiffs on the defendant for the amount or price of the said cotton, together with the charges on the custody and shipment thereof, and a reasonable commission to the plaintiffs on the purchase thereof; and the plaintiffs in fact say, that, afterwards, and before the commencement of this action, to wit, on &c., they, the plaintiffs, did purchase in parts beyond the seas, to wit, at New Orleans aforesaid, a large quantity, to wit, two hundred *and six* bales of Liverpool fair cotton, at such a price as to stand in $9\frac{1}{4}d.$ per lb. laid down in Liverpool aforesaid, in the county aforesaid, freight, duty, and every charge included, both at Liverpool aforesaid and in parts beyond the seas; and the plaintiffs, afterwards, to wit, on the day and year last aforesaid, shipped

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the said cotton in parts beyond the seas, to wit, at &c., on board of a certain vessel bound for the port of Liverpool aforesaid, in the county aforesaid, and afterwards, to wit, on the day and year last aforesaid, they, the plaintiffs, drew a certain bill of exchange on the defendants at sixty days' sight for a certain sum of money, to wit, for the sum of 2742*l.* 4*s.* 8*d.*, being the amount of the price of the cotton so purchased by the plaintiffs as aforesaid, together with the charges of the custody and shipment thereof, and a reasonable commission to the plaintiffs on the said purchase thereof; and the plaintiffs in fact further say, that, afterwards, to wit, on the 10th day of June, the said cotton so purchased by the plaintiffs for the defendant as aforesaid, arrived in Liverpool aforesaid, and then was ready to be delivered to the defendant, to wit, at Liverpool aforesaid, in the county of Lancaster; of all which said several premises the said defendant then had notice; and the plaintiffs afterwards, to wit, on the 11th day of June, requested the defendant to accept and receive the said cotton so purchased as aforesaid, and to accept the said bill of exchange drawn by the plaintiffs on the defendant as aforesaid, which was then presented to the said defendant for acceptance: yet the said defendant, not regarding his said promise, did not nor would accept or receive the said cotton so purchased as aforesaid, or any part of it, when so requested as aforesaid, but wholly neglected and refused so to do; and the defendant, further disregarding his said promise, did not nor would accept the said bill of exchange when so presented to him for acceptance as aforesaid, or at any time afterwards, and did not nor would in any manner pay or satisfy the plaintiffs for the said cotton so purchased as aforesaid, or any part thereof, and the same is wholly unpaid for: by means whereof the plaintiffs lost and were deprived of the use and benefit of the said bill of exchange which the defendant ought to have accepted as aforesaid, and the plaintiffs are wholly unpaid and unsatisfied for their dis-

bursements in the purchase and shipment of the said cotton. *Exch. of Pleas, 1837.*

To this declaration the defendant pleaded, thirdly, that the quantity of cotton in the declaration mentioned to have been purchased and shipped, and for the price of which, together with the said charges and commission, the said bill was drawn as in the said declaration mentioned, was a large quantity of cotton, more than and exceeding the said extent of two hundred bales, that is to say, the same amounted to two hundred and six bales, and this the defendant is ready to verify.

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Special demurrer to the third plea.

The point stated on the part of the plaintiffs was, that the plea did not contain any answer to the whole of the count which it professed to answer.

The defendant's main point referred to the declaration as defective.

Wightman, in support of the demurrer.—This is a demurrer to the plea; but it will be necessary in the first place to refer to the declaration. There is a double breach—first, that the defendant would not accept or receive the cotton or any part thereof, but that he neglected and refused so to do; and, secondly, that he refused to accept the bill. The breach as to not giving the bill cannot perhaps be supported, as it was drawn for too large a sum; but the other breach, for not accepting or receiving the cotton or any part thereof, is sufficient. There is a distinct allegation that the defendant refused to accept or receive any part of the cotton; and he was clearly bound to receive to the extent of two hundred bales.

Sed per Curiam (stopping *Crompton*, who was to have argued for the defendant).—You do not shew sufficiently in your declaration that the plaintiffs were ready and willing to deliver the two hundred bales only.

Leave to amend, on payment of costs.

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Trespass for assaulting plaintiff, and striking him with a bludgeon, and with the said bludgeon striking and pushing him down to and upon the ground. Pleas, first, not guilty; secondly, as to *assaulting, beating, and ill-treating* the plaintiff, that defendant was possessed of a public-house, that plaintiff made a great noise and disturbance therein, and obstructed the business; whereupon defendant requested him to cease from making such noise and disturbance, and to leave the house, which he refused; whereupon defendant, in defence of his possession, *molliter manus imposuit* to remove plaintiff, and did remove him out of the house:—

thirdly, as to assaulting, beating, and ill-treating the plaintiff, son assault demesne. Replication to the two latter pleas, *de injuriâ*. At the trial, the Judge directed the jury, that, even though the plaintiff assaulted the defendant first, if the defendant struck the plaintiff with a bludgeon, he was not justified on these pleadings:—*Held*, that this was a misdirection.

Quære, whether the pleas were a sufficient answer to the whole of the trespasses charged in the declaration?

TRESPASS for assault and battery. The first count charged that the defendant assaulted Elizabeth Oakes, the wife of the plaintiff, and with a bludgeon struck her many violent blows, &c., and with the said bludgeon struck and pushed her down to and upon the ground, per quod, &c. Second count, for a similar assault and battery of the plaintiff. The defendant pleaded, first, Not guilty; secondly, as to *assaulting, beating, and ill-treating* the said Elizabeth, as in the first count mentioned, a special plea in the same terms as that pleaded in the case of *Oakes and Wife v. Wood* (a); thirdly, a similar plea, as to the assaulting, beating, and ill-treating the plaintiff, as in the second count mentioned; fourthly, as to assaulting, &c., the plaintiff, son assault demesne. To each of the special pleas the plaintiff replied *de injuriâ*.

This was an action arising out of the same transaction as that of *Oakes and Wife v. Wood*. On the trial before *Bosanquet, J.*, at the Spring Assizes for Cheshire, the learned Judge, in the course of his summing up, told the jury, that, in his opinion, even if the plaintiff struck the defendant first, yet, if the defendant struck him *with the bludgeon*, he was not justified on these pleadings. The jury found for the plaintiff on all the issues, and assessed the damages in respect to the injury to the wife at 60*l.*, and for the assault on the plaintiff at 1*s.*

In Easter Term, *Jervis* obtained a rule nisi for a new

(a) 2 M. & W. 791.

trial, on the ground of misdirection, against which, in *Exch. of Pleas*,
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Evans shewed cause, and cited *Gregory v. Hill* (a), *Collins v. Rennison* (b), *Reece v. Taylor* (c), and *Bush v. Parker* (d), as authorities to shew that the matter stated in the special pleas constituted no answer to the aggravated battery charged in the declaration, and therefore that the direction of the learned Judge was right.

The Court, however, were clearly of opinion that it was a misdirection; but entertaining some doubt whether the pleas, inasmuch as they professed only to justify the "assaulting, beating, and ill-treating," were an answer to so much of the charge as related to the striking and pushing down with the bludgeon, they suggested that the verdict should be entered for the defendant on the special pleas, the plaintiff being at liberty to move to enter judgment for him non obstante veredicto. The case stood over, that this proposition might be considered by the plaintiff's counsel; but, in Michaelmas Term, the plaintiff not having assented to these terms, the rule for a new trial was made

Absolute.

Jervis and *Welsby* were to have argued in support of the rule.

(a) 8 T. R. 299.

(b) Sayer, 138.

(c) 4 Nev. & M. 470.

(d) 4 M. & Scott, 588; 1 Bing. N. C. 72.

1837.

IN THE HOUSE OF LORDS.

GARLAND v. CARLISLE.

A sheriff who seizes and sells the goods of a bankrupt under a *fi. fa.*, before commission issued, but after an act of bankruptcy, without notice of the act of bankruptcy, is liable in trover to the assignees.

A WRIT of error having been brought on the judgment of the Court of Exchequer Chamber in this case (*a*), it was argued in last Hilary Vacation by Sir *F. Pollock* and Sir *W. Follett* for the plaintiff, and by *Bompas*, Serjt., and *Ball*, for the defendant. In Trinity Vacation, the Judges delivered their opinions seriatim, affirming by a majority the judgment of the Exchequer Chamber; Lord *Denman*, C. J., *Vaughan*, J., and *Bolland*, B., *dissentientibus* (*b*). The judgment of the Court below was thereupon, on the motion of the Lord Chancellor, who concurred in opinion with the majority of the Judges,

Affirmed.

(*a*) 2 C. & M. 31—124.

(*b*) See the judgments fully reported, 4 Scott, 587 to 717.

END OF MICHAELMAS TERM.

REPORTS OF CASES
ARGUED AND DETERMINED
IN
The Courts of Exchequer,
AND
Exchequer Chamber.

HILARY TERM, 1 VICTORIÆ.

REGULÆ GENERALES.

IT IS HEREBY ORDERED, that, on and after the fourth day of this present Hilary Term, all affidavits sworn before a commissioner in the country, or a Judge of Assize on the circuit, be read in the several Courts of Queen's Bench, Common Pleas, and Exchequer, or before any Judge of the same, or any of the Masters thereof, in like manner as other affidavits, and without obliging the party filing them to obtain copies of the same. *Exch. of Pleas, 1838.*

AND IT IS FURTHER ORDERED, that all affidavits read before a Judge of any of the said Courts, or before a Master of the same, shall be filed with the Masters of the said Courts, and be alphabetically indexed; such affidavits to be delivered to the said Masters, in order to be filed, four times in the year, that is to say, the last day of each term.

[Signed by all the Judges.]

Jan. 31st,
1838.

IT IS ORDERED, that the 17th article of the rule made in Hilary Term, 2 Will. 4, for regulating the practice of all the Courts of King's Bench, Common Pleas, and Exchequer of Pleas, be henceforth annulled, and that in all cases special bail may be justified before a Judge at chambers, both in term and vacation.

IT IS ALSO ORDERED, that no rule for a special jury be granted on behalf of any defendant or plaintiff in replevin, except on an affidavit, either stating that no notice of trial has been given, or, if it has been given, then stating the day for which such notice has been given; and, in the latter case, no such rule is to be granted unless such application is made for it more than six days before that day: provided that a judge may, on summons, order a rule for a special jury to be drawn up at any time.

IT IS FURTHER ORDERED, that henceforth every rule of Court delivered out in vacation, shall be dated the day of the month and week on which the same is delivered out, but shall be intitled as of the term immediately preceding such vacation.

[Signed by all the Judges.]

Earl SPENCER v. SWANNELL.

An action of debt for penalties for not setting out tithes, on the stat. 2 & 3 Edw. 6, c. 13, is a penal action within the stat. 21 Jac. 1, c. 4, s. 4, and therefore the new rules as to pleading do not apply to such a case, and nil debet is still a good plea to such an action.

DEBT on the 2 & 3 Edw. 6, c. 13, s. 1, for treble value of tithes not set out. Plea, nil debet. Special demurrer, assigning for cause, "that the said plea is a plea of nil debet, which, by the rule of Court in that case made and provided, under the authority of the statute in such case made and provided, shall not be allowed in any action." Joinder in demurrer.

Newman (in Michaelmas Term) appeared to support the demurrer, but the Court called on

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J. Henderson, to support the plea.—First, that part of the rules of pleading of Hilary Term, 1834, on which this demurrer is founded, extends only to actions of contract, and this is not an action of contract. In *Faulkner v. Chevell (a)*, (which was an action of debt on the 22 Geo. 2, c. 46, s. 14, against a deputy clerk of the peace for practising as an attorney), Mr. Justice *Littledale* observed, that “the rules were never meant to apply to these cases, and if they do so it was an oversight in drawing them up;” and also that “the joining of debt and covenant under one head, may perhaps shew that those actions of debt were contemplated which have some kind of contract for their foundation.” The Courts have indeed lately entertained and decided questions as to the introduction of several counts in actions of this sort; but that interposition is founded on a different part of the rules, viz., on the “General Rules and Regulations,” which purport to be universal in their application. That part of the rules which is now under consideration, is confined by the general heading to “Pleadings in particular actions,” and by the particular heading to actions in covenant and debt. If the defendant had pleaded the plea substituted by the third clause of this section, viz., that “he never was indebted in manner and form as in the declaration alleged,” there would have been no defence on the record, that plea having, in the language of the rule, “the same operation as the plea of non-assumpsit in indebitatus assumpsit,” and the plea of non-assumpsit operating “only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law.” It is manifest that this count is not founded on any contract or promise, express or im-

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plied, to pay the treble value, which is the debt demanded.

Assuming, (and the opinion expressed by the Court of King's Bench in *Faulkner v. Chevell* (a) appears to be an authority for the proposition), that the defendant might well plead not guilty, it is clear, that, there being nothing in the new rules to affect the legal operation of such a plea in this form of action, that plea would operate precisely as it formerly did, that is, in the same way as *nil debet*. This result would tend to shew that actions of the present kind were not contemplated in this part of the rules, as it could not be supposed, that, while the plea of not guilty is left with all its former incidents, it was intended to take away the right to plead the same defence in the form which was more usual than not guilty, and is more nearly adapted to the form of the action, viz. a denial of the debt demanded. The whole context of this branch of the new rules shews that actions of contract only were contemplated, and if so, the prohibition of the plea of *nil debet* is limited within the bounds of that context. That the present is not an action of contract, appears from various authorities. Lord *Coke*, speaking of this form of action, observes that (b) "This action of debt is no action of debt within the statute of 23 Hen. 8, because it is neither upon a specialty or by contract; neither is this action upon this statute any action for any wrong personal immediately done to the plaintiff, for it is a nonfeasance, viz. a not setting out of the tithes; Trin. 42 Eliz. in *communi banco*, adjudged, in action for the treble value upon this statute, not guilty or *nil debet* are good pleas, and so upon the statute 5 Eliz. upon perjury." The case here referred to is no doubt that of *Wortley v. Herpingham* (c), in which *Coke*, then Attorney-General, was engaged, and in which it was held, that, "in an action upon the statute which prohibits a

(a) 5 Adol. & Ell. 215.

(b) 2 Inst. 651.

(c) Cro. Eliz. 766.

thing upon which a penalty is demanded, the issue may be non culpabilis or nil debet." The cases of *Johns v. Carne* (a), and *Bawtrey v. Isted* (b), are to the like effect. And because this is not a debt ex contractu, action inde does not lie against an executor for the act of his testator in not setting out tithes: *Moreton v. Hopkins* (c), *Holl v. Bradford* (d): for the same reason the Statute of Limitations of the 21 Jac. 1, is not pleadable to this action: *Talory v. Jackson* (e). In none of its incidents is this an action of contract.

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Secondly, the operation of the rules for the purpose contended for by the plaintiff, even if intended by the learned framers of these rules, is prevented by the proviso at the end of the first section of the statute of the 2 & 3 Will. 4, c. 42, empowering the judges to frame the rules, viz. "provided always that no such rule or order shall have the effect of depriving any person of the power of pleading the general issue, and giving the special matter in evidence, in any case where he is now, or hereafter shall be, entitled to do so by any act of Parliament now or hereafter to be passed." The defendant here is entitled to plead the general issue, and give the special matter in evidence thereunder, by virtue of the stat. 21 Jac. 1, c. 4, s. 4, which enacts, "that, if any information, suit, or action shall be brought or exhibited against any person or persons, for any offence committed or to be committed against the form of any penal law, either by or on the behalf of the king, or by any other, or on the behalf of the king and any other, it shall be lawful for such defendants to plead the general issue, that they are not guilty, or that they owe nothing, and to give such special matter in evidence to the jury that shall try the same, which matter being pleaded had been a good and sufficient matter in law to have discharged the said defendant

(a) Cro. Eliz. 621.

derfin, 407.

(b) Hob. 218.

(d) 2 Sid. 88.

(c) 2 Keble, 502; S. C. 2 Si-

(e) Cro. Car. 513.

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against the said information, suit, or action," &c. The first clause of this act applies in terms only to proceedings by common informers and promoters; the second appears to be in furtherance of the first clause; and the third is also confined to proceedings by an informer or relator. [*Alderson, B.*—The preamble is in favour of the plaintiff.] But the enactment in the fourth section is clear and positive, and goes beyond the previous clauses of the preamble, and reaches the present case. This is an action by the party grieved, for an offence committed against the form of a penal law. The 2 & 3 Edw. 6, c. 13, s. 1, contemplates an offence and creates a penalty, as it commands the setting out of the tithes "under the pain of forfeiture of treble value of the tithes so taken or carried away." The 53 Geo. 3, c. 127, s. 5, enacts that "no action shall be brought for any *penalty* for the not setting out tithes," unless within six years. Lord *Kenyon* speaks of "penal actions on the 2 & 3 Edw. 6, c. 13, s. 2" (*a*). Penal statutes are defined to be "such acts of Parliament whereby a forfeiture is inflicted for transgressing the provisions therein contained" (*b*). The statute may be penal, though in its operations the law may be remedial, and though the action founded on it might be in all respects governed by the regulations applicable to actions by common informers. The law that creates a penalty is not the less penal that it gives the penalty to the party grieved. It is true that the plea of the general issue, *nil debet* or *non culp.*, in actions of this sort, was held good long before the passing of the 21 Jac. 1, c. 4; but, until the passing of that act, it would only operate as at common law, as a denial, and would not let in special matter.

Thirdly, supposing the plea objectionable, it should have been objected to in a different way—the plaintiff might have applied to the Court or a Judge to disallow or set it aside. The rule provides that the plea shall not be "*allowed*."

(*a*) *Radford v. M'Intosh*, 3 T. R. 635.

(*b*) *Dwarris on Statutes*, 642.

Where it is intended that the failure to observe a prescribed alteration of the old form of pleading shall be the subject of demurrer, that intention is expressed, as in the rule v, 1, as to the local description in trespass *quare clausum fregit*. And the plea having been allowed expressly or tacitly, is good, if when found by a jury it would bar the action. The question, whether it ought to be *allowed*, affects the practice and discipline of the Court in this respect, and not the construction of the plea when brought before the Court on demurrer.

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Newman, *contra*.—Before the stat. 21 Jac. 1, the pleas of not guilty and *nil debet* were good pleas, and the plea of not guilty is still a good plea, and the decision of the present case will not affect it. It has been said that the rules as to pleading in “Covenant and Debt,” ss. 3 & 4, apply only to actions of contract; but that is not so. The 3rd rule speaks of actions of debt on simple contract, but the 4th rule is general,—“in other actions of debt in which the plea of *nil debet* has been hitherto allowed, including those on bills of exchange and promissory notes, the defendant shall deny specifically some particular matter of fact alleged in the declaration, or plead specially in confession and avoidance.” [*Parke*, B.—The real question is, not whether this comes within that rule, but whether we had power to make such a rule to apply to such a case as the present. We think the words in their literal meaning would include it. The object of the framers of those rules was to take away the plea of *nil debet* wherever it could be done; but the question is, whether they had power to do so, where the action is on a penal statute within the meaning of the 21 Jac. 1, c. 4.] The stat. 3 & 4 Will. 4, c. 42, s. 1, which empowers the Judges to make alterations in the mode of pleading, provides “that no such rule or order shall have the effect of depriving any person of the power of pleading the general issue and giving the special

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matter in evidence, in any case wherein he is now or hereafter shall be entitled so to do by virtue of any act of Parliament now or hereafter to be in force." The question then arises, whether this is a penal action in which a party acquires a right to plead *nil debet* under the statute 21 Jac. 1, c. 4, s. 4: and it is submitted that it is not. The stat. 2 & 3 Edw. 6, c. 13, is a *remedial* and not a penal act: and it is clearly laid down, although some of the old dicta are the other way, that, before the statute of James, a defendant had a right to plead *nil debet* to an action on the former statute, and therefore a defendant did not acquire a right to plead it from the statute of James. The statute 21 Jac. 1, is stated in the title to be "An act for the ease of the subject concerning informations upon penal statutes." It applies to all penal actions properly so called, such as actions by or in the name of the King, or *qui tam* actions, but not to such an action as the present. The stat. 31 Eliz. c. 5, made in *pari materia*, which limits the time within which actions on penal statutes may be brought, has been held not to apply to actions by the party grieved: *Calliford v. Blawford* (a). That construction could not have prevailed if they had been deemed penal actions. In *Selw. Nisi Prius*, vol. 2, p. 1312, it is said: "An action on this statute (2 & 3 Edw. 6, c. 13), being brought by the party grieved for the purpose of trying a right, and being a more beneficial remedy to the defendant than to be carried into the spiritual court, is not considered as a penal action brought by a common informer; consequently a new trial will be granted where it is clear that the verdict has been given for the defendant against the weight of evidence, although in penal actions the courts will not permit a verdict for the defendant to be disturbed on this ground:" citing *Holloway v. Hewett* (b), *Lord Selsea v. Powell* (c), and *Brook v. Middleton* (d). In *Bones v. Booth* (e), which was an

(a) 1 Show. 353, 4.

(b) Trin. 13 Geo. 3, MSS.

Serjt. Hill, p. 339.

(c) 6 Taunt. 297.

(d) 10 East, 269.

(e) 2 Sir W. Blac. Rep. 1226.

action on the 9 Anne, c. 14, for preventing excessive and deceitful gaming, that statute is said to be *remedial* where the action is brought by the party injured, but *penal* when brought by a common informer. The proper plea in this case would have been not guilty, and not nil debet.

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Cur. adv. vult.

The judgment of the Court was now delivered by—

PARKE, B.—This was an action of debt for the treble value, for not setting out tithes, to which there was a plea of nil debet. To this plea the plaintiff demurred, and assigned for a special cause, that it was a plea not allowed by the pleading rules. The case was argued late in last Term, before my Brothers *Alderson* and *Gurney* and myself, and we have considered it, and are of opinion that the plea is good.

Two reasons were urged on the argument for the validity of the plea. The first, that the rules did not extend to any actions of debt but those on contract: the second, that this plea was given by the statute 21 Jac. 1, c. 4, and therefore that the Judges had no power, by reason of the proviso in section 1 of 3 & 4 Will. 4, c. 42, to deprive the subject of the benefit of this plea, and of giving the special matter in evidence under it, whatever they may have intended to do by the rules.

The Court, on the argument, intimated its opinion on the first point, but took time to consider the second, and look into the authorities. We think, after full consideration, that this is a *penal* action within the fourth clause of 21 Jac. 1, c. 4, and consequently that the Judges had no power to deprive the defendant of the right to plead nil debet, or not guilty.

That section is as follows :—" That, if any information, suit, or action, shall be brought or exhibited against any

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person or persons, for any offence committed or to be committed against the form of any penal law, either by or on the behalf of the King, or by any other, or on the behalf of the King and any other, it shall be lawful for such defendants to plead the general issue, that they are not guilty, or that they owe nothing, and to give such special matter in evidence to the jury that shall try the same, which matter, being pleaded, had been a good and sufficient matter in law to have discharged the said defendant or defendants against the said information, suit, or action; and the said matters shall be then as available to him or them to all intents and purposes, as if he or they had sufficiently pleaded, set forth, or alleged the same matter in bar or discharge of such information, suit, or action."

There is no doubt but that this case is within the letter of this section, taken by itself.

A penal law is a statute which imposes a penalty; and the statute of Edward 6th does impose a penalty, for it trebles the original duty by way of punishment, thus making the defaulting party liable to a forfeiture beyond the amount of the duty withheld. It is true that it is an action not *barely penal*, for, on the principle that it is for a duty also, such action lies by executors within the equity of the statute *de bonis asportatis in vitâ testatoris*; *Morton v. Hopkins* (a); and, after a recovery in this action, the plaintiff cannot recover the tithe in any other suit; *Champion v. Hill* (b); nor is it purely penal within the rule adopted by the Courts as to granting new trials after a verdict for the defendant.

The question then is, whether by the context or any judicial exposition of the words of this section, actions of this kind, or any actions for penalties by the party grieved, are taken out of the operation of the words according to their ordinary construction.

(a) 2 Sid. 407.

(b) Yelv. 63.

In the context nothing is to be found which restricts the ordinary meaning of the words of this clause to any particular class of informations. The title (though that is not strictly a part of the act, and is therefore of little weight) is *general*, "An act for the ease of the subject concerning informations upon penal statutes;" the recital in the preamble is, "That offences against penal laws may, with more ease and less charge, be commenced and tried in the counties where they are committed, and that the poor commons are grievously molested by troublesome persons commonly called relators, informers, and promoters, by compelling them to appear in his Majesty's Courts at Westminster." This recital applies only to such informations as might be prosecuted either at the assizes or sessions, or in the superior Courts, at the option of the informer; and the first clause removes that particular grievance, by restricting such informations to the courts below; and the third imposes a further check on these informations, (namely, such as "by that act are before appointed to be heard and determined in their proper counties") (a), by requiring the relator to make affidavit that the offence was committed in the county, and within one year. The second section is, in its terms, general; but it has received a judicial construction, and been held to apply only to the same description of informations as before mentioned. See the case of *Barber v. Tilson* (b), and also Mr. Justice Bayley's observations in *Whitehead v. Wynn* (c). Its effect is, with respect to such informations, to re-enact the provisions of the 35 Eliz. c. 5, s. 2, with some alteration as to the mode of taking advantage of the objection, and to enforce the laying the venue in the proper county.

These three sections, therefore, remedy the particular mischief recited. Then comes the section in question, which, instead of being confined in express terms, as the

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(a) *Leigh v. Kent*, 3 T. R. 362. (c) 5 Mau. & Selw. 430.
(b) 3 Mau. & Selw. 430.

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third section immediately preceding is, to the informations before appointed to be tried in their proper counties, uses general language. The words introductory of this (the fourth section), instead of "Be it *further* enacted," as in the second and third, are, "And be it *also* enacted," as if proceeding to a new head. It then goes on, "That, in any information, action, or suit," (no in any *such* information, &c.) "on *any* penal statute, it shall be lawful for the defendant to plead the general issue, and give the special matter in evidence." Now, this section is not, in any mode of construing it, whether as relating only to such suits on penal statutes as are thereafter to be brought in the inferior Courts, or to all suits on such statutes, calculated to remove the particular grievance mentioned in the preamble, viz. that the subject has been vexatiously sued in the superior when he might have been sued in the inferior Courts, and out of the proper county : the section is, in any view of it, an additional boon to the subject ; it goes beyond the grievance recited, but it is within the general object of the act, the ease and relief of persons sued. We see, therefore, no reason in the context contained in the recital for putting a narrow construction on the general words of this clause, and there is no other part of the act which can have that effect. On the other hand, the proviso (the fifth section), which clearly includes some actions in which the remedy was in the superior Courts alone, affords an argument, we do not say a conclusive one (for the proviso may have been inserted for the sake of caution), but still it affords some argument, that some part of the statute was intended to apply to other penal statutes than those in which the remedy was either in the superior or inferior Courts, at the option of the informer ; and, if so, the section in question, being in its terms general, may well answer that description.

We think, therefore, that there is nothing in the context which limits the general language of the fourth section,

and there is not certainly any judicial exposition of *this section*, (though of all the other sections there is (a),) *Exch. of Pleas, 1838.* which confines it to that class of actions which was capable of being brought either in superior or inferior Courts, at the time of the passing of the 21 Jac. 1, or to actions by common informers. *Earl SPENCER v. SWANNELL.*

There is indeed a dictum of Lord *Mansfield's*, in the course of the argument of the case of *Sibly v. Cuming* (b), which it is proper to notice. It was an action of debt for bribery, on the statute 2 Geo. 2, c. 24, and the question was, whether, under *nil debet*, the defendant could prove that he was a discoverer under the act, so as to be excused from the penalties. In the course of the argument Mr. *Mansfield* contended, that the right to give that evidence did not depend upon the old rules of pleading only, for the act of 21 Jac. 1, c. 4, extended to actions upon subsequent statutes; which Lord *Mansfield* denied. No decision was, however, ultimately given on that point, for the Court held that the defendant was not a discoverer within the meaning of the statute; and Lord *Mansfield's* denial may have been directed to the general proposition, that the *whole* of the statute, 21 Jac. 1, applied to subsequent statutes, as well as those in force at the time, which it certainly does not, as it has been frequently held that every subsequent statute which imposes a penalty *to be recovered in the superior Courts*, gives a new remedy to which the statute of James does not apply: *Rex v. Gaul*, and *Hicks' case* (c). We are strongly inclined to think that the *fourth section* does apply to all subsequent statutes; probably it was on this ground that the Court of King's Bench intimated their opinion in the case of *Faulkner v. Chevell* (d), that not guilty was a proper plea; but whether the subsequent statutes be within this clause of

(a) Lord *Kenyon*, in *Leigh v. Kent*, 3 T. R. 364; 1 Salk. 372, 373.

(b) Burr. 2467.

(c) 1 Salk. 372, 373.

(d) 5 Ad. & Ellis, 213.

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the statute or not, the dictum of Lord *Mansfield* above referred to does not bear on this question, whether the fourth section applies to all penal actions, or only to penal actions of a particular description.

It was argued for the plaintiff, that, at common law, before the statute, not guilty or *nil debet* were both good pleas to an action of debt for the treble value of tithes; *Langley v. Haynes* (a), *Johns v. Carne* (b), *Wortley v. Herpingham* (c), all prior to the statute 21 Jac. 1, as unquestionably they were; and therefore that the right to plead those pleas was not *given* by the statute in the case of this particular action. That is true; but it is equally true of every other penal action; and besides, the statute does more than give the right to plead such pleas, for it allows the defendant to give in evidence under those pleas any matter which, if pleaded, would have been sufficient in law to discharge the defendant from that information or suit, and every such matter might probably not have been given in evidence under the general issue at common law, as the law was then understood.

For these reasons, which we have given at some length on account of the importance of the case, we think the plea good; but the plaintiff may, if he pleases, withdraw the demurrer and join issue, on payment of costs.

(a) Moore, 302.

(b) Cro. Eliz. 621.

(c) Cro. Eliz. 766.

CLARKE, Public Officer of the MANCHESTER AND LIVERPOOL DISTRICT BANKING COMPANY, v. SHARPE.

Where a party drew a bill, dating it generally "London," on an acceptor also

resident in London, whose address was stated in the bill:—*Held*, that proof that a letter, containing notice of the dishonour of the bill, was put into the post-office, addressed to the drawer at "London," was evidence to go to the jury that he had due notice of dishonour.

ASSUMPSIT on a bill of exchange for 200*l.*, dated 18th of October, 1836, drawn by the defendant on one Morris, payable at four months' date to the defendant's

order, and indorsed by him (through several hands) to the Manchester and Liverpool Banking Company. Plea, that the defendant had not due notice of dishonour. On the trial before Lord *Abinger*, C. B., at the London Sit-tings after last term, the bill, being put in, appeared to be drawn by the defendant, and dated by him in the general terms — “London, 18th October, 1836,” and signed “H. B. Sharpe,” on Morris, who also resided in London, and whose place of residence was stated in the acceptance. The bill, having been paid to the Banking Company by one of their customers, was indorsed by them to their London correspondents, Messrs. Smith, Payne, and Smith, in whose hands it was when it fell due, on the 21st of February, 1837, and it was by them pre-sented to the acceptor, and dishonoured. The dishonour of the bill being communicated by Smith, Payne, and Smith to the Banking Company, they, on the 4th Febru-ary, put into the post-office at Manchester a letter con-taining a notice of its dishonour, directed “Mr. H. B. Sharpe, London.” There was no further evidence to shew that the letter had reached the defendant, nor any negative evidence on the defendant’s part to shew that it had not. It was contended for the defendant, that a notice addressed so generally was not sufficient. On the other side, *Mann v. Moors* (a) was relied on. The Lord Chief Baron left it to the jury to say whether the notice had reached the defendant in due time, and they found a verdict for the plaintiff. The learned Judge gave the defendant leave to move to enter a nonsuit, and

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Thesiger now moved accordingly.—This notice was not sufficient: no proof was given of any diligence used by the company to discover the defendant’s address. The acceptor’s residence, which also was in London, being

(a) Ry. & M. 249.

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stated on the face of the bill, they might have applied to him for the address of the drawer. *Mann v. Moors* is undoubtedly an authority in favour of the plaintiff; but, in *Walter v. Haynes (a)*, Lord *Tenterden* also held that a notice addressed to the drawer at "Bristol" was too general. It is true, the bill was not in that case dated in the same general manner. [*Parke, B.*—All that can be inferred from what Lord *Tenterden* says is, that a notice so addressed is evidence to go to the jury. If you had given any negative evidence, the case would be different.] The defendant can hardly be expected to give such evidence: he cannot know by what means the plaintiff will prove the notice. It is better that the holder should be held excused for the delay necessary to search for the address of the drawer, than that so general a description, which can hardly by possibility reach him, should be considered sufficient.

LORD ABINGER, C. B.—I have known such evidence admitted a hundred times. If the party chooses to draw a bill and date it so generally, it implies that a letter sent to the post-office, and so directed, will find him. Here the jury were of opinion that the letter actually reached the defendant.

PARKE, B.—The only question is, whether this was not evidence to go to the jury that the letter reached the defendant in due course. On that point we have the direct authority of Lord *Tenterden*. It is a strong argument, that, if the post-office could not find Mr. Sharpe, inquiry would not have found him.

The other Barons concurred.

Rule refused.

(a) Ry. & M. 149.

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FARWIG v. COCKERTON.

R. V. RICHARDS moved for a rule to shew cause why the issue and subsequent proceedings in this cause should not be set aside for irregularity, and why the order of *Parke, B.*, to amend the issue, should not be rescinded. It was an action for goods sold and delivered, tried before the Secondary under the 3 & 4 Will. 4, c. 42, s. 17. On the trial, (on the 1st January), it appeared that there was a variance in date between the writ of trial and the issue, and it was objected that this was fatal to the plaintiff's case. The Secondary, however, decided that the cause should proceed; and evidence having been given on both sides, the plaintiff had a verdict. After the trial, *Parke, B.*, on the authority of *Cox v. Painter (a)*, amended the issue, by making the date conformable to that in the writ of trial.

Where, on the trial of a cause under a writ of trial, it appeared that there was a variance between the dates in the writ of trial and in the issue, and such variance was amended by a Judge's order after the trial, the Court would not allow the defendant (who had proceeded in his defence after taking the objection at the trial) afterwards to object that such amendment could be made, and that the proceedings were irregular.

Richards now contended that the learned Judge had no power, after the trial, to make the amendment, and referred to *White v. Farrer (b)*, and *Whipple v. Manley (c)*. The proceedings being irregular on the 1st of January, this order could not operate retrospectively to make them otherwise on that day. [*Parke, B.*—If you meant to take advantage of the irregularity, you ought to have withdrawn—whereas you went on, and had all the benefit of the trial.] In *Holt v. Meddowcroft (d)*, where a common jury panel had been returned together with a special jury panel, and no special jurymen appearing, the cause was tried by a common jury, the trial was set aside: and it was held that the objection was not waived by the defendant's proceeding and making his defence, after having taken the objection. Lord *Ellenborough, C. J.*,

(a) 1 Nev. & P. 581.

(b) 2 M. & W. 288.

(c) 1 M. & W. 432.

(d) 4 M. & Sel. 467.

Exch. of Pleas, there said, "I cannot agree that it amounts to a consent
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 COCKERTON. on the part of the defendant, because being, as it were,
 tied to the stake, and dragged into trial, he endeavours to
 make the best of it."

PARKE, B.—There it was altogether a mistrial. If you choose to avail yourself of such an objection as this, you ought not to avail yourself of the benefit of the trial also.

GURNEY, B.—You are precisely in the same case as if the amendment had been made after the jury were sworn, as in *Cox v. Painter*.

The rest of the Court concurred.

Rule refused (a).

(a) See *Sherman v. Tinsley*, 4 Scott, 286.

ELLIOTT v. THOMAS and Another.

Where a joint order is given for several classes of goods, the acceptance of one class is a part acceptance of the whole, within s. 17 of the Statute of Frauds.

Semble, that, if the purchaser of goods has used (in the opinion of the jury) more of them than was necessary for experiments, that does not amount to an acceptance within the statute.

ASSUMPSIT for goods sold and delivered, and on an account stated. Plea, the general issue. At the trial before Parke, B., at the Summer Assizes for Yorkshire, the following appeared to be the facts of the case.

On the 16th of November, 1835, the traveller of the plaintiff, who is a steel manufacturer at Sheffield, took from the defendants, who were in partnership as edge-tool makers in Birmingham, a verbal order for thirty-five bundles of common steel at 34s., and five bundles of cast steel at 48s., of a specified thickness. The traveller wrote down the order at the time in his own book, but no memorandum was made of it such as to satisfy the Statute of Frauds. On the 19th of December, the defendants wrote by post to the plaintiff for three cwt. more of cast

Agreed, that the defence that there was no sufficient contract to satisfy the Statute of Frauds, may be taken under the general issue.

steel. The steel ordered on the first occasion was forwarded by canal to the defendants at various times in the months of December and January. On the 10th of February the defendants wrote to the plaintiff the following letter:—

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“ Birmingham, February 10, 1836.

“ SIR—We are in want of the remainder of cast steel ordered, which we trust will be forwarded immediately. In your invoice of the 11th and 16th of January, you charge thirty-seven bundles of cast steel; we have only received thirty-four bundles from Pickford’s, consequently three bundles short. We must again request you will be careful to send it the right thickness; part of the last was wrong. Your attention will oblige, yours respectfully,

“ R. & G. Thomas.”

On the 17th of February, the plaintiff’s traveller called again on the defendants. They told him they were afraid the steel was not of a proper temper, but too hard, and begged that he would state that to the plaintiff. The defendants then paid the traveller 128*l.* 12*s.* in part of the price, leaving a balance (according to the invoice) of 112*l.* 3*s.* 9*d.*, for which balance the defendants proposed to give their bill at twelve months, on receiving some allowance for the wrong temper in the steel; but which the traveller did not assent to. On the 19th of March, the defendants wrote to the plaintiff as follows:—

“ Birmingham, March 19, 1836.

“ SIR—There appears to be some common steel ordered, not yet sent, but which is much wanted; pray attend to this immediately, and oblige, yours respectfully,

“ R. & G. Thomas.”

On the 7th June the plaintiff’s traveller again applied to the defendants for payment of the balance. They stated that the steel was of the wrong size, but they had used part of it, and requested him to change the remainder. He answered that he would represent what they

Exch. of Pleas, 1838, said to the plaintiff, which he did. On the 25th August the traveller again saw one of the defendants, and pressed for a settlement of the account, when the defendant said they would never pay for the steel, for it was a wrong size.

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On the part of the defendants, it was contended that there had been no acceptance of the cast steel sufficient to bind the defendant within the 17th section of the statute of frauds. The plaintiff's counsel had objected that such defence could not be raised under the general issue, but the objection was overruled; and evidence was then adduced to shew that the cast steel furnished was of too hard a temper to be wrought into the tools for which the defendants had required it, and (as to the steel ordered on the 19th of December) that it was not of the thickness specified in the order; and that the defendants had used 13 lbs. only of the cast steel in experiments on its quality. The value of the cast steel included in the written order of the 19th of December was proved to be 24*l*. It appeared that the prices of cast steel varied very much according to its quality, being sometimes as high as 70*s*. and 80*s*. per bundle.

The learned judge having stated to the jury, that the question in the cause was whether there had been an acceptance of the cast steel included in the verbal order of the 16th of November, so as to bind the defendants, left it to them to say, first, whether the steel supplied was fit for the edge-tool trade; secondly, whether, if it was not, the defendants had agreed nevertheless to take it, and whether their letter of the 10th of February was not, at all events, a waiver of the objection as to its thickness; and thirdly, whether more of it was used than was necessary to make an experiment on its quality. The jury found that the steel was according to order, and that the defendants had used more of it than was necessary; and gave a verdict for the plaintiff, damages, 112*l*. 3*s*. 9*d*.

In Michaelmas Term, *Cresswell* obtained a rule nisi to reduce the damages to 24*l.*, or for a new trial, on the grounds that there was no acceptance of the cast steel included in the verbal order, within the meaning of the Statute of Frauds; and also that the verdict was against the evidence.

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Alexander and *Wightman* now shewed cause (a).—The objection arising on the statute was avoided by shewing that the cast steel and the common steel were the subject of one entire order, and that part of the goods ordered, the common steel, was accepted without objection. All that the statute requires is, that “the buyer shall accept *part* of the goods so sold, and actually receive the same.” But there was also sufficient evidence of acceptance of the cast steel. The letter of the 10th of February was clearly a waiver of the objection as to the thickness. Then, as to the other objection, as to the temper, that was never started until some weeks after the delivery of the steel; and, after having kept it so long, with an opportunity of making the necessary experiments, the defendants had no right to repudiate it. The right of return must be exercised within a reasonable time; here the goods were not finally repudiated for several months. Assuming the goods to be according to the order, as the jury have found, what can amount to an acceptance of them, but the receiving and keeping them, and using a part? If that be not an acceptance, nothing but the using the whole, or reselling the goods, would be sufficient to bind the buyer. In *Percival v. Blake* (b), where the defendant had bought an article, and suffered it to remain on his premises for two months without examination, and then found that it was unfit for use, it was held that, after that length of time, he could not avail himself of the objection in answer to an action for the price, unless it

(a) They gave up the objection that the defence was not admissible under the general issue.
(b) 2 Car. & P. 514.

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appeared that some deceit had been practised on him as to the quality of the article. But it may also be contended that if, as the jury have found, the defendants have used more of the steel than was necessary for experiments, they thereby assumed such a dominion over it as amounted to an acceptance: *Okell v. Smith (a)*, *Street v. Blay (b)*. [*Alderson, B.*—It is a startling proposition, that, if the jury think the party has used too much for experiments, he must take and pay for all. If so, then, if a buyer draws too large a sample, the jury thinking so, he is fixed with the property in the whole bulk.] In *Street v. Blay*, Lord *Tenterden* says, in delivering the judgment of the Court (c): “Whatever may be the right of the purchaser to return a warranted article in an ordinary case, there is no authority to shew that he may return it where the purchaser has done more than was consistent with the purpose of trial.” [*Alderson, B.*—There the purchaser had resold the horse; but, suppose he had only ridden him, in the opinion of the jury, further than was necessary for trial, would that fix him with the price? *Parke, B.*—I do not think this part of the case will serve you.] At all events, there was sufficient proof of acceptance, independent of the finding of the jury on this point. Indeed, unless the statement of the *price* of the goods be held a necessary ingredient (d), the letter of the 10th February was a sufficient memorandum in writing of the contract.

Cresswell, contra.—Even supposing goods ordered by parol to be furnished pursuant to the order, the buyer is not bound to take them, the contract being, per se, inoperative by the Statute of Frauds. On the other hand, whether they answer the order or not, if the buyer agree

(a) 1 Stark. N. P. C. 107.

(b) 2 B. & Adol. 456.

(c) 2 B. & Adol. 463.

(d) But see *Elmore v. Kingscote*,

8 D. & R. 143; 5 B. & Cr. 583;

Hadley v. M^cLaine, 10 Bing. 482;

4 M. & Scott, 340.

to take to the goods actually supplied, he is precluded from saying that there was no acceptance. The first question therefore is, whether the acceptance of the common steel operated as an acceptance of the cast steel also. It is submitted that the part acceptance meant by the statute is the part acceptance of one entire thing of the same character, so that the taking to one part is necessarily a taking to the rest. A *delivery* of part never amounts to a delivery of the whole, unless the parties appear to have so intended it. It cannot, at all events, be said that there was an acceptance of the whole, so as to preclude the defendants from objecting to the quality: all that can be contended is, that there was a waiver of a written contract as to the cast steel. In *Thompson v. Maceroni* (a), where goods of considerable value were made to order, and remained in the possession of the vendor at the vendee's request, with the exception of a small part, which the vendee took away, it was held that there was no acceptance of the residue within the Statute of Frauds. [Alderson, B.—*Price v. Lea* (b) is an authority against you; there it seems to have been admitted, that, if there had been one entire contract for the two articles sold (cream of tartar and lac dye), the acceptance of one would have been an acceptance of both.] That case is not a direct authority, because it became unnecessary to decide the point. But, in *Hodgson v. Le Bret* (c), Lord *Ellenborough* ruled that the appropriation by the purchaser to his own use of one of several articles bought at the same time in a shop, was not sufficient to take the other articles out of the statute. [Parke, B.—That appears to have been on the ground that he considered them as separate contracts; but that was overruled in *Baldey v. Parker* (d).]

[He then proceeded to argue that the evidence did not

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(a) 3 B. & Cr. 1; 4 D. & R. 619.

(c) 1 Camp. 233.

(b) 1 B. & Cr. 156; 2 D. & R. 295.

(d) 3 D. & R. 220; 2 B. & C.

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warrant the finding of the jury ; and, on the suggestion of the Court, it was agreed that the damages should be reduced to 24*l.*, the plaintiff taking back the cast steel included in the first order.]

PARKE, B.—The first question in this case is one of some importance, but none of the Court entertain any doubt upon it:—It is, whether there was a sufficient part acceptance of the goods ordered in November, to take the case out of the Statute of Frauds. That was a joint order for common steel and cast steel: the effect of such joint order, unless explained, would be to make it one entire contract; since we must assume that one article would not have been furnished at one stipulated price, unless the other had been agreed to be paid for at the other price. There was no explanation in this case, and therefore it must be taken to be a joint contract. Then, one of the articles, the common steel, was certainly accepted; and the question is, whether that acceptance is sufficient to take the case out of the statute as to the cast steel also: and I am clearly of opinion that it is. In order to determine the question, the best course is to look at the words of the statute itself. Those words are—"that no contract for the sale of any goods, &c., for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept *part of the goods so sold*, and actually receive the same, or give something in earnest to bind the bargain or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." The object of the statute was to prevent perjury in proving by parol a contract which was never made in fact: but none of its provisions effectually exclude perjury; they only tend to diminish the probability of its being committed. There may be perjury in swearing to the handwriting of the party charged, or in proving the agency of

the party signing on his behalf: neither does the acceptance of the goods, or the giving of earnest, operate as a certain prevention of perjury. The same observation applies to Lord *Tenterden's* Act, 9 Geo. 4, c. 14, under which part payment of principal or interest is sufficient to take a case out of its operation. Looking then at the words of the statute, and assuming that there is but one contract, I am of opinion that there was an acceptance of part of *the goods sold*, within the words and also within the principle of the statute. I should have been of this opinion, supposing that there were no decided case on the subject. Several cases have however been referred to on the part of the defendant, for the purpose of proving that this was not a sufficient part acceptance. In *Thompson v. Maceroni*, the Court held that the acceptance of a small part of goods to the value of 144*l.*, made to order, was not sufficient to enable the seller to recover against the buyer for the price of the whole, as for goods *sold and delivered*. The Court there say, in effect, that there was no proof of actual *delivery*, nor such proof of actual acceptance as to take the case out of the Statute of Frauds, *i. e.* the defendant had not accepted the whole, so as that a count for goods sold and delivered could be maintained for the whole. That case seems to me to have turned entirely on the form of the action: the plaintiff could not succeed unless there was a delivery of the whole, or at least an actual acceptance and receipt of the whole, so as to be equivalent to a delivery. In *Hodgson v. Le Bret*, Lord *Ellenborough* formed his opinion, apparently, on the ground of there having been separate contracts; but that case is greatly shaken by *Baldey v. Parker*, which shews that the contract in *Hodgson v. Le Bret* ought to have been considered as a joint one, and that the act of the purchaser's writing her name on the goods was no acceptance. *Hodgson v. Le Bret*, therefore, is no binding authority. No other case was cited in argument which bears upon the

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point; and that of *Price v. Lea*, referred to by my brother *Alderson*, is rather an authority the other way. *Holroyd, J.*, there says: "There was not then one entire contract for both the articles, so as to make the acceptance of one the acceptance of the whole." The inference therefore is, (I do not say it is conclusive), that, if the contract had been entire, the acceptance of part would have been deemed sufficient to take the case out of the statute as to the whole. I am of opinion, therefore, that there was in this case a sufficient acceptance of part to bring the case within the exception of this section of the Statute of Frauds; and that the defendants may be made responsible upon this joint contract for two articles, by the receipt of one; provided both the articles were furnished according to that contract, and were such as ought to have been delivered pursuant to it. That was to be proved by the plaintiff, and he did give evidence of it for the consideration of the jury; but, as we are not altogether satisfied with the propriety of the verdict in that respect, it will be better for the parties to enter into some compromise, to avoid the necessity of a new trial, which we otherwise might be disposed to grant.

BOLLAND, B.—I am of the same opinion—that there was a sufficient part acceptance. The case of *Hodgson v. Le Bret* is not reconcileable with *Baldey v. Parker*, and must be considered as of doubtful authority.

ALDERSON, B.—I am of the same opinion. The words of the statute appear to me quite decisive of the question. What are "the goods so sold?"—the goods sold by that contract. If the contract be for two classes of goods, does not he accept part who accepts one class?

GURNEY, B.—I am of the same opinion. Part of the goods included in the contract was accepted; that was a

sufficient acceptance of the rest; and the only question remaining was, whether they were according to order.

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Rule absolute by consent, to reduce the damages to 24*l.*, the defendant undertaking to return all the steel complained of.

BENNION v. DAVISON and Three Others.

ASSUMPSIT. The declaration stated, that the defendants, before and at the time of the making of their promise thereafter next mentioned, were the owners and proprietors of a certain ship or vessel called the Frodsham Trader, then in a certain river near Chester, to wit, the river Dee, and bound from thence to Liverpool; and thereupon the plaintiff, theretofore, and before the making of the promise thereafter next mentioned, to wit, on &c., at the request of the defendants, caused to be shipped and loaded in and on board of the said vessel divers goods, to wit, 800 bushels of potatoes, of great value &c., to be taken care of, and safely and securely carried and conveyed by the defendants, as owners of the said vessel, from the said place of loading to Liverpool aforesaid; and, in consideration thereof, and of certain freight and reward to the defendants in that behalf, they, the defendants, promised the plaintiff to take due and proper care of and safely and securely carry and convey the said goods as aforesaid; and, although the defendants then had and received the said goods, to be taken care of and carried and conveyed as aforesaid; yet the defendants, not regarding their duty in that behalf, nor their said promise, whilst they had the care and custody of the said goods for the purpose aforesaid, took so little and

Declaration in assumpsit stated that the defendants were the owners of a vessel lying in a certain river, and bound to Liverpool; that the plaintiff caused to be shipped on board her a quantity of potatoes, to be safely carried by the defendants, as owners of the said vessel, to Liverpool; and, in consideration thereof, and of certain freight, the defendants promised the plaintiff to take proper care of and safely carry the said goods as aforesaid: with a breach, that, through the defendants' negligence, they were damaged. Plea, non assumpsit:—*Held*, that the ownership of the defendants was not admitted by the plea.

A plea denying a particular fact alleged in the declaration does not admit other immaterial allegations in the declaration.

Quære, whether it admits the other material allegations, so as that they may be taken as facts to go to the jury?

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such bad care of the same, that, by and through the negligence and improper conduct of the defendants in that behalf, the said goods became and were greatly injured and damaged, &c.

Pleas, first, *non assumptum*; secondly, that the defendants did take due and proper care of and safely and securely carry and convey the goods: on which issues were joined.

At the trial, before *Coltman, J.*, at the last Liverpool Assizes, it was proved that the plaintiff shipped on board the vessel mentioned in the declaration, a quantity of potatoes, which were damaged by the salt water having found its way into the hold. No express contract with the defendants was proved, and there was no proof that they were joint owners. The defendants' counsel thereupon applied for a nonsuit; but it was contended for the plaintiff that the joint ownership of the defendants was admitted by the pleas; the learned judge had some doubt upon this point, and directed a verdict for the plaintiff, reserving leave to the defendant to move to enter a nonsuit. The jury thereupon found for the plaintiff—damages 5*l.* In Michaelmas term,

Cresswell obtained a rule nisi for a nonsuit, pursuant to the leave reserved; against which, in the present term,

Wightman and *Addison* shewed cause.—The question is, whether the allegation of the ownership of the defendants, which is stated in the declaration only by way of inducement, is not admitted by the plea of the general issue. The general issue denies only *the promise*; that is, it puts in issue whether the plaintiff delivered the goods to the defendants to be safely carried, and whether in consideration thereof the defendants undertook safely to carry them. The defendants admit that they are the owners, but deny the bailment. The instance given in the

new rule, of the case of an action on a policy of insurance, is applicable. There, the general issue operates as a denial of the subscription to the policy by the defendants, but not of the *interest*, of the commencement of the risk, &c. So, here, if the defendants had intended to deny their *character* as owners, they should have pleaded specially. Again, in actions against carriers and other bailees, the general issue operates as a denial only of the contract of bailment, whether express or implied. *Passenger v. Brookes* (a) appears to be an authority in favour of the plaintiff. There, in assumpsit on a special contract between a timber-merchant and a builder, the defendant sought to prove, under the general issue, by evidence dehors the contract, that there was no consideration for the agreement: and *Tindal*, C. J., having rejected the evidence, the Court held that he was right in doing so, although it was urged that the consideration was in law parcel of the promise. The case is the same in effect as if it had been proved on the trial that the defendants had admitted that they were owners. [*Alderson*, B.—Is not the substance of the plea rather this—that the defendants protesting they are not owners, yet say they made no such contract? It is no more than a waiver of proof; as if they had said, we will not put you to prove that we are owners, if you can prove a contract with us (b)]. It is immaterial to the case whether they were actually owners, except as the ownership is a medium of proof of their undertaking to carry. [*Parke*, B.—That argument amounts to this, that the allegation of ownership is immaterial; and I believe that is the true answer to the objection.] There is also a distinct averment that the defendants had and received the goods to be taken care of and carried *as aforesaid*, that is, by them as owners, which is

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(a) 1 Scott, 560; 1 Bing. N. C. 587.

(b) See *Edmunds v. Groves*, 2 Mee. & W. 641.

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not denied. The plaintiff has made these allegations material, as media of proof. He states a special contract to carry as owners, by a particular vessel; and the mere delivery of the goods on board, without an acceptance of them by the defendants, would not be sufficient to bind them.

Cresswell, contra.—If the averment of ownership be immaterial, that is sufficient to entitle the defendants to the nonsuit. There is clearly no admission on the record which can be taken by the plaintiff as proof of the contract. As soon as it appears that any matter of fact alleged is necessary in order to raise the inference of the promise, the general issue denies it: but if, in order to establish the promise, it is not necessary to prove the ownership, the general issue does not involve it. A plea denying the ownership only would have raised an issue altogether immaterial. [*Alderson*, B.—If the argument for the plaintiff be correct, it would become necessary to deny every inducement, because the defendant never could be secure as to what it might be necessary to prove at the trial, from which the jury might infer the contract.]

PARKE, B.—It is not necessary to say more than this as to the effect of an admission on the record, that, at all events the taking issue on one fact averred in the declaration is only an admission of the other *material* averments necessary to be proved. Taking it that here there is an admission of the material allegations, there is no admission of the allegation of ownership, because that is perfectly immaterial. The declaration would be good if that, as well as the other allegation that the defendant received the goods to be safely carried as aforesaid, were struck out: the statement, that, in consideration that the defendant had shipped the goods on board the vessel, and of the freight, the defendants promised safely to carry

them, is quite sufficient, coupled with the allegation that the goods were not safely carried, to make a complete case of liability against the defendants. The admission on the record, then, being only an admission of material averments, not of all the immaterial statements which the pleader chooses to introduce, there is no admission here that the defendants were owners, so as to raise the inference that the captain was their agent. The fact in issue upon the plea of non-assumpserunt is, whether any such contract as alleged was made; and the plaintiff must prove that it was, by shewing that the defendants made it themselves, or, if the captain made it, that he was their agent. With respect to the case of *Passenger v. Brookes*, the short note in Bingham's New Cases is explained by the fuller report given by Mr. Scott. The evidence tendered was for the purpose of shewing that there was no consideration for the agreement declared on, by setting up a prior agreement between the plaintiff and a third party, under which the plaintiff was bound to do the same act which the declaration alleged he had agreed to do, as the consideration of the defendant's promise. That was collateral, not a denial of the consideration declared on: it was a sort of confession and avoidance of it.

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BOLLAND, B., concurred.

ALDERSON, B.—It is clear that this averment, being an immaterial one, was not admitted; but it is not to be taken for granted, that, if it had been material, there was an admission of it *as a fact* to go to the jury.

GURNEY, B., concurred.

Rule absolute.

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MACKINTOSH v. TROTTER and Others.

A lessee cannot,
even during his
term, maintain
trover for fix-
tures attached
to the freehold.

TROVER for fixtures, furniture, &c. Plea, that the goods and chattels in the declaration mentioned were not, nor were any of them, the property of the plaintiff. At the trial before *Coltman, J.*, at the last Liverpool Assizes, it appeared that the action was brought by the plaintiff, an innkeeper at Liverpool, to recover from the defendants, his assignees under a fiat in bankruptcy, which he alleged to be void, the value of certain tenant's fixtures and household furniture, which they, as his assignees, had put up to sale by auction, together with the lease of his house and the goodwill of his business. The fixtures and furniture were sold in one lot, for 79*l.* 8*s.* 8*d.*, and it was proved that the former still remained affixed to the freehold, not having been removed by the purchaser. It was contended, for the defendants, that the fixtures were not recoverable in trover. The learned Judge was disposed to think that the defendants, by selling them, had, as between themselves and the plaintiffs, treated them as goods and chattels: he however desired the jury to assess the value of the fixtures separately; and they having stated their value at 55*l.*, a verdict passed for the plaintiff for 79*l.* 8*s.* 8*d.*, leave being reserved to the defendants to move to reduce the damages by the sum of 55*l.*

In Michaelmas Term, *Cowling* obtained a rule accordingly, citing *Amos on Fixtures*, 243, and *Minshall v. Lloyd* (a).

Cresswell, Wightman, and *Addison*, now shewed cause.—These were fixtures which the plaintiff, being tenant, might have removed; and for such fixtures, if the tenant be dispossessed of them during his term, he may maintain trover. *Pitt v. Shew* (b). That was certainly an action of tres-

(a) 2 M. & W. 450.

(b) 4 B. & Ald. 206.

pass; but *Lee v. Risdon* (a) having been cited as an authority against the plaintiff, the Court nevertheless held, that the *value* of such fixtures was recoverable under the terms "goods, chattels, and effects." If trespass was maintainable for the wrongful taking, so trover would lie for the wrongful conversion and detention of them. If, indeed, the term is determined without the tenant's having removed them, he cannot afterwards take them. [Parke, B.—Is not *Minshall v. Lloyd* decisive of this case?] The argument for the defendant was there mainly rested on the ground that the premises had re-vested in the lessor by forfeiture and ejectment brought. In *Colegrave v. Dios Santos* (b), Abbott, C. J., expressed his opinion at Nisi Prius that the plaintiff might recover in trover for such fixtures as were removeable between landlord and tenant; and, though the judgment ultimately turned on another point, the Court did not intimate any doubt that the tenant might have recovered them *during the term*. In *Lawton v. Salmon* (c), which was trover by the executor against the tenant of the heir, to recover salt-pans fixed to the floor, the only question made was, which was entitled, the executor or the heir; but no question was raised whether the action of trover was maintainable; and a case was referred to which is mentioned in *Lawton v. Lawton* (d), where a *cider-mill* had been recovered in trover. *Davis v. Jones* (e) is another authority for the plaintiff. [Parke, B.—The *jibs* there were not fixtures at all. Would trover lie for a crop of standing corn? Your argument amounts to this, that the plaintiff may maintain trover for preventing him from exercising his right of removal.] The tenant has more than a mere right of removal—he has the *property*.

Esch. of Pleas,
1838.

MACKINTOSH
v.
TROTER.

(a) 7 Taunt. 188; 2 Marsh.
495.

(b) 3 D. & R. 255; 2 B. & C. 76.

(c) 1 H. Bl. 259, note.

(d) 3 Atk. 13.

(e) 2 B. & Ald. 165.

Exch. of Pleas,
1838.

MACKINTOSH
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TROTTER.

In *Hallen v. Runder* (a), Lord Lyndhurst, C. B., and Bayley, B., appear to draw a distinction between the case where the action is brought by the owner of the inheritance or by the tenant. There, the tenant was held entitled to maintain assumpsit for the price of fixtures sold by him to the incoming tenant, though they were never severed from the freehold. [Parke, B.—He sells the right to remove, which is described under the word *fixtures*.]

Alexander and Cowling, in support of the rule, were stopped by the Court.

PARKE, B.—*Minshall v. Lloyd* is a direct authority on this point. I gave my opinion in that case, not on my mere impression at the time, but after much consideration of this point—that the principle of law is, that, whatsoever is planted in the soil belongs to the soil—*quicquid plantatur solo, solo cedit*; that the tenant has the right to remove fixtures of this nature during his term, or during what may, for this purpose, be considered as an *ex-crescence* on the term; but that they are not goods and chattels at all, but parcel of the freehold, and as such not recoverable in trover. That case is a direct authority, so far as my opinion and that of my brother *Alderson* go; and I think it was a correct decision.

BOLLAND and GURNEY, Bs., concurred.

Rule absolute.

(a) 1 C. M. & R. 266.

DOE d. BLOXAM v. ROE.

Esch. of Pleas.
1838.

KELLY moved for a rule to shew cause why the declaration should not be set aside for irregularity, on the ground that it contained no quo minus clause.—It was held in *Doe d. Gillett v. Roe (a)*, that actions of ejectment are not within the new rules, and therefore that the declaration should commence and conclude in the usual form. [*Parke, B.*—That is an authority that the declaration is good in the old form; have you any authority that it is not good in the new?] It is clear that this declaration would have been irregular before the new rules, and if they have no application to ejectments, the irregularity necessarily continues.

The Court refused to set aside a declaration in ejectment, on the ground that it contained no quo minus clause.

PARKE, B.—There have been decisions, both in the King's Bench and Common Pleas (*b*), that a variance from the old form in the *title* of a declaration in ejectment is immaterial, if the tenant has sufficient information when he is to appear. I think we may go a step further, and hold the formal commencement immaterial.

The rest of the Court concurred.

Rule refused.

(a) 1 C. M. & R. 19.

1 Scott, 166, 1 Bing. N. C. 253 ;

(b) *Doe d. Evans v. Roe*, 1 Ad.

Doe d. Smithers v. Roe, 4 Dowl.

& El. 11; *Doe d. Ashman v. Roe*, P. C. 374.

Exch. of Pleas,
1839.

LEWIS v. ALCOCK, Esq.

Declaration in case against a sheriff for a false return to a *fi. fa.*, stated the judgment and writ; that the writ was delivered to the defendant as sheriff, to be executed; and that, although there were then and afterwards, before the return of the writ, goods of the debtor within the defendant's bailiwick, whereof he could and ought to have levied the monies indorsed on the writ, and although a reasonable time to have made the levy had elapsed, yet the defendant, not regarding his duty, did not within such reasonable time levy the money, but therein wholly failed and made default, nor hath he paid the money, or any part thereof, to the plaintiff; and the defendant afterwards falsely returned *nulla bona*:—*Held*, that the defendant could not set up as a defence, under the plea of not guilty, that the debtor had assigned the goods to a third party.

CASE against the sheriff of Surrey for a false return to a *fi. fa.* The declaration stated a judgment recovered by the plaintiff in the Court of King's Bench against one Henry Gompertz for 200*l.*, and a writ of *testatum fieri facias* issued thereon, directed to the sheriff of the county of Surrey, indorsed with a direction to levy 122*l.*, besides sheriff's poundage, &c. It then alleged that the writ so indorsed, afterwards and before the execution thereof, to wit, on &c., was delivered to the defendant, who then and from thence until and after the committing of the grievance thereafter mentioned, was sheriff of the said county of Surrey, to be executed in due form of law; and although there were then and afterwards, and before the return of the said writ, divers goods and chattels of the said Henry Gompertz within the bailiwick of the defendant as such sheriff as aforesaid, whereof the defendant could and might and ought to have levied the monies so indorsed on the said writ and directed to be levied as aforesaid, whereof the defendant, so being such sheriff as aforesaid, always had notice; and although a reasonable time for the defendant, as such sheriff, to have made the levy, and before he made the return to the said writ, and committed the grievances thereafter mentioned, had elapsed; yet the defendant, so being such sheriff as aforesaid, not regarding his duty, &c., did not nor would, within such reasonable time, levy the said monies so directed to be levied as aforesaid, or any part thereof, but therein wholly failed and made default; nor hath he paid the said sum of 122*l.*, or any part thereof, to the plaintiff: and afterwards, to wit, on &c., the defendant falsely and deceitfully returned upon the said writ that the said H. Gompertz had not any goods or chattels in his the defendant's bailiwick, whereof he could cause to be levied the

damages aforesaid, or any part thereof, &c. Plea, not guilty. *Exch. of Pleas, 1838.*

LEWIS
v.
ALCOCK.

At the trial before *Littledale, J.*, at the last Surrey Assizes, the only question between the parties was, whether a bill of sale given by Gompertz, the debtor against whom the execution issued, to one Longmore, upon notice of which the sheriff had forborne from levying under the fieri facias, was bonâ fide or colourably given. It was however contended for the plaintiff, on the authority of *Wright v. Lainson (a)*, that the defendant could not raise this question under the plea of not guilty. The learned Judge reserved the point; and a verdict having been found for the plaintiff,

Channell, in Michaelmas Term, obtained a rule, pursuant to the leave reserved, to shew cause why a verdict should not be entered for the plaintiff for 122*l.*, or why there should not be a new trial.

Thesiger, Dowling, and C. Turner now shewed cause. This case is distinguishable from *Wright v. Lainson*. There, the declaration alleged that the defendant had levied, and the breach consisted only in his not having the money in his hands, and in his making the return of nulla bona; and the question, whether the goods seized were those of the debtor or of his assignees, clearly was not involved in the issue of not guilty. But that case proceeds on the express ground that every thing involved in the breach of duty charged is included in the issue. Now, if the defendant here shewed that the goods were not Gompertz's, he committed no breach of duty in not levying on them. [*Parke, B.*—*Wright v. Lainson* is exactly on all fours with this case. The breach there was, that the sheriff had not the money ready to pay over, and made the

(a) 2 M. & W. 739.

Exch. of Pleas,
1838.

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return of nulla bona. Here, the inducement which points to the duty of the sheriff is, that the writ was delivered to him, and that there were goods of the debtor within his bailiwick: then it becomes his duty to seize them. Then the breach is, that he did not use due diligence to make the levy, and that he returned nulla bona. If it were proved that he did not return nulla bona, the latter proposition would be disproved; if that he did use due diligence, the former would be disproved. These are the only two propositions in issue, according to *Wright v. Lainson*. *Alderson, B.*—The *falsehood* of the return is the conclusion of law, if the facts stated in the inducement are true: not guilty puts that fact in issue which is wrongful, if the facts stated in the inducement be true.] Suppose there were no such statement as that “although there were divers goods and chattels of the said H. G. &c. whereof the defendant ought to have levied,” &c., but that after the statement of the writ, the declaration had proceeded, “yet the defendant did not levy, &c., *although* there were divers goods,” &c., then the latter clause would have formed part of the neglect of duty complained of; and the mere transposition of the words can make no difference. [*Parke, B.*—It would then, in truth, be inducement put in the wrong place. *Alderson, B.*—I do not see why you may not treat the allegation as to the writ in the same way;—“although a certain writ,” &c.]

Platt, Channell, and Petersdorff, in support of the rule, were stopped by the Court.

PARKE, B.—There can be no doubt that this case falls within the authority of *Wright v. Lainson*. The defendant ought, however, to have leave to amend his plea.

ALDERSON, B.—The object of the rule is, that the parties, when they come to trial, shall know, as precisely as is

possible, what the issue is. I am disposed to give the rule as large a construction as possible.

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The other Judges concurring, the rule was made absolute for a new trial, on payment by the defendant of the costs of the former trial and of this application, the defendant having leave to amend.

Rule accordingly.

FRANCIS v. ROOSE.

SLANDER. The declaration stated, that, before the committing of the grievance thereafter mentioned, the plaintiff had been and acted as clerk to certain persons, to wit, the Marquis of Anglesey and Lord Dinorben, owners and proprietors of a certain copper mine, and carrying on business under the name of the Parys Mine Company and also before and at the time of the committing of the grievance, &c., the plaintiff had been and was and acted as clerk to certain other persons to whom the said Marquis of Anglesey and Lord Dinorben had sold and assigned the said mine, and who also carried on business under the name of the Parys Mine Company; and that the plaintiff had always conducted himself honestly in the course of his employment as such clerk, and had never, until the committing of the grievance, &c., been suspected or believed to have been guilty of any offence punishable by law: yet the defendant, well knowing the premises, but contriving and intending to injure the plaintiff, and to cause it to be believed that he had been guilty, in the course of his said employment, of grave crimes and felonies punishable by law, heretofore, to wit, on the 1st day of July, A. D. 1836, in a certain discourse then had, &c.,

Declaration in slander stated that plaintiff had been and was clerk to a certain mining company; that the defendant, intending to cause it to be believed that he had been guilty, in the course of his employment, of grave crimes and felonies, heretofore, *to wit*, on the 1st July, 1836, in a discourse of and concerning the plaintiff, and of and concerning his having acted as such clerk, spoke of and concerning the plaintiff, &c., these words: "You have done things with the company for which you ought to be hanged, and I will have you hanged before the 1st of

August," (thereby meaning that the plaintiff had been guilty of felonies punishable by law *with death by hanging*):—*Held* good, on motion in arrest of judgment.

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of and concerning the plaintiff, and of and concerning his having acted as such clerk to the said Marquis of Anglesey and Lord Dinorben, and to the said other persons called the Parys Mine Company, falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning his having acted as such clerk as aforesaid, the false, scandalous, malicious, and defamatory words following, that is to say:—"You (meaning the plaintiff) have done things with the company, (meaning the said Marquis of Anglesey and Lord Dinorben, and the said other persons &c., as aforesaid) for which you ought to be hanged, and by G—, I (meaning the defendant) will have you hanged before the 1st of August;" and in answer to a question then and there put by the plaintiff, as to what things he had so done, the defendant answered, "Many things," (thereby meaning that the plaintiff, while he was and acted as such clerk as aforesaid, had been guilty of divers felonies punishable by the laws of this realm *with death by hanging*): by means whereof, &c.

Plea, not guilty.

At the trial before *Alderson*, B., at the last Assizes for Anglesey, the learned Judge having left it to the jury to say whether they thought the defendant intended to impute to the plaintiff the commission of any offence punishable by law, they found a verdict for the plaintiff, damages 40s.

In Michaelmas Term, *Jervis* obtained a rule to shew cause why the judgment should not be arrested, on the ground that the defendant could not have meant to impute to the plaintiff, *as clerk* to the company, the commission of a capital offence.

Welsby now shewed cause.—There are two grounds on which this rule ought to be discharged. First, it was quite possible that even on the day alleged in the declaration, the 1st July, 1836, the plaintiff might, as clerk to

the company, have committed a capital offence. By the 2 & 3 Will. 4, c. 123, whereby the capital punishment was abolished for the forgery of bills, notes, &c., the forgery of powers of attorney for the transfer of stock in the Bank of England, &c., still remained capital, and so continued until the passing of the 1 Vict. c. 84. The company might be the proprietors of stock in the Bank of England, and the plaintiff might have forged powers of attorney for the transfer of such stock. But, at all events, the date stated in the declaration being immaterial, the imputation might refer to offences punishable capitally before the 2 & 3 Will. 4, c. 123.

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But secondly, the words laid in the declaration are actionable *per se*, without colloquium or innuendo. The jury must be taken to have found that the words were spoken with the intent charged, *viz.* to impute the commission of crimes and felonies punishable by law. It is clear that, at least after verdict, it need not appear that any specific felony was imputed: *Blizard v. Kelly* (a). *Curtis v. Curtis* (b) is a direct authority in favour of the plaintiff. There the words were, "You have committed an act for which I can transport you," and they were held actionable without any colloquium or innuendo. *Tindal, C. J.*, says, in the course of the argument: "The defendant meant to impute the commission of an indictable offence; as to transportation, *he was merely mistaken in his law.*" And *Gaselee, J.*, says, "We may reject the innuendo that the plaintiff had been guilty of a *transportable* offence." In *Donne's case* (c), there cited, the words, "If you had your deserts, you would have been hanged before now," were held actionable *per se*. Cases to the same effect are mentioned in *Com. Dig.*, Action on the Case for Defama-

(a) 2 B. & Cr. 235; 3 D. & R. Scott, 337.

519.

(c) Cro. Eliz. 62.

(b) 10 Bing. 477; 4 M. &

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tion, (E. 1.) The notion that slanderous words are to be construed in mitiori sensu has long been exploded.—He cited also *Penfold v. Westcote* (a), and *Peach v. Oldham* (b).

Jervis, contra.—It may be admitted that the words would have been actionable per se, had not the plaintiff tied himself down, by the colloquium and innuendo, to a particular construction of them. And it is not enough to say, that it is *possible* that the plaintiff might have committed some one capital crime in the course of his employment; he must shew that the words imported some substantial and intelligible charge of criminality against him: *Rex v. Horne* (c). [*Parke*, B.—You say it is impossible that such a felony as is imputed by the innuendo could be committed; the answer is, that it is perfectly possible, and must be so taken after verdict.]

PARKE, B.—We may either reject the innuendo at the end of the words, and the declaration is good, the words being actionable of themselves; or, if it be said that the innuendo must be proved, we must intend that it was proved; and if the words were spoken before the last repeal of the statutes relating to forgery, the plaintiff might have forged powers of attorney for the transfer of stock belonging to his employers; if before the former repeal, he might have committed a capital offence by the forgery of bills of exchange, orders and receipts for money, &c.

BOLLAND, B., concurred.

ALDERSON, B.—The innuendo may have a sensible meaning, that the defendant meant to impute a capital offence,

(a) 2 N. R. 335.

(b) Cowp. 275.

(c) Cowp. 682.

being ignorant of the law, whereas, if he had known the law, he would have known that the former statute was repealed.

Exch. of Pleas,
1833.

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GURNEY, B., concurred.

Rule discharged.

MOGG and Another, Assignees of PURNELL, an Insolvent Debtor, v. BAKER.

ASSUMPSIT for money had and received to the use of the plaintiffs as assignees, and on an account stated. Plea, non assumpsit. At the trial before *Tindal, C. J.*, at the last Bristol Assizes, it appeared that in the spring of 1835, the insolvent Purnell became tenant to the defendant of an inn at Clevedon, in Somersetshire. On his entering upon the house, one Carter supplied furniture to the value of 170*l.*, which was paid for by the defendant, it being then agreed that Purnell should give the defendant a bill of sale of "the goods and furniture" as a security for the advance. In July, 1836, (the bill of sale not having yet been given, although Purnell had repeatedly asked for and offered to execute it), the defendant presented his account to Purnell, including the 170*l.* for furniture, and amounting in the whole to 403*l.*: and on the 12th July, Purnell signed the account as correct, and on the same day executed a bill of sale to the defendant of all his household goods, furniture, wines, &c., and also gave him a warrant of attorney, to secure the amount of the account. Purnell continued in possession of the house and furniture until the 24th September, when the defendant put a person in possession, and all the property on the premises was sold, under his directions, for 249*l.* On the 30th

Assignees of a bankrupt or an insolvent debtor take only such property as he was equitably as well as legally entitled to at the time of the bankruptcy or assignment. Therefore, if A. agree to assign to B. certain specific goods, by way of security for money advanced by B. for the purchase of them; and afterwards, in pursuance of such agreement, actually assign them; although the assignment itself be under such circumstances as would have rendered it void under the Insolvent Debtors Act, and A. subsequently takes the benefit of that act, his assignees are not entitled to such goods. *Secus*, if the agreement related to such goods as A. might have at the time of the execution of the assignment, their corpus not being ascertained at the time of the agreement.

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September, Purnell was arrested at the suit of another creditor, and went to prison, and subsequently petitioned for and obtained his discharge under the Insolvent Debtors Act. The present action was brought to recover the proceeds of the sale, the assignees alleging that the bill of sale and warrant of attorney were void under the 32nd section of the Insolvent Act, 7 Geo. 4, c. 57. It was proved, that, before the 12th July, Purnell had expressed his desire to give the defendant security, and that he gave it (in the language of the witness) "quite spontaneously," the defendant having made no application to him to execute it until that day. A verdict was found for the plaintiffs, it being agreed that the amount of damages should be settled by an arbitrator.

In Michaelmas Term, *Bompas*, Serjt., obtained a rule nisi for a new trial, on the ground that the assignees were not entitled to recover, the bill of sale having been given under the previous agreement made in 1835.

Crowder and *Barstow* now shewed cause.—This was clearly a voluntary transfer within the meaning of the Insolvent Act, and having been made within three months next before the commencement of the imprisonment, was void under s. 32. [*Parke*, B.—The rule was moved for and granted on the ground that there was an arrangement, at the time the furniture was put in, that a bill of sale should be given to the defendant as a security for the price, and that a kind of equitable mortgage of the furniture was thereby created, which would prevent its passing to the assignees. The giving of the bill of sale itself was undoubtedly altogether the spontaneous act of the insolvent.] The whole agreement rested merely in contract until the bill of sale was given in pursuance of it. The question still is, whether the assignment of the 12th July was voluntary: if so, the statute declares it to be fraudulent and void. The word "voluntary" means *without pres-*

sure, or, as the evidence here was, *spontaneous*: *Stuckey v. Drewe* (a), *Arnell v. Bean* (b), *Margareson v. Saxton* (c). It was not the less voluntary because there was an engagement to do the act before, or because the party was *morally* bound to pay the money. [*Parke, B.*—The authority of *Stuckey v. Drewe* has been questioned, and indeed it may be considered as overruled, so far as it appears to lay it down that a conveyance made *bonâ fide*, in consideration of an advance of money, but altogether on the motion of the insolvent, is therefore voluntary. But in truth, the point in this case is wholly beside the effect of the assignment: it is whether, supposing it were cancelled, the plaintiffs had a right to recover. If there was an equitable assignment of the particular furniture, they had not; because the assignees either of a bankrupt or of an insolvent can recover only such things as he had both a legal and an equitable right in (d). If that equitable interest existed, the effect of the assignment would merely be to convert it into a legal one. The question seldom arises in the case of bankruptcy, because of the provision as to reputed ownership. If, indeed, it was an agreement to execute a bill of sale at a future day of all the goods the insolvent might then have, it would not be an equitable assignment; but, if it was of certain specific furniture, *plus* the other goods he might have, then it would.] It was for the defendant to make out that the agreement related to the specific furniture; but that is left quite ambiguous on the evidence. The bill of sale clearly included *more* than the furniture which had been supplied by Carter; it included all the insolvent's other goods. The assignees would be entitled to recover for everything which was not definitely included in the agreement.

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(a) 2 Myl. & K. 190.

(c) 1 Younge & Col. 530.

(b) 8 Bing. 87; 1 M. & Scott,
151.

(d) See *Hunt v. Mortimer*, 10
B. & Cr. 44.

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[*Parke, B.*—You ought to have insisted at the trial that it was only an agreement for the transfer of undefined goods, which the party might have at the time of the execution of the bill of sale. The inference from the evidence is that it was definite as to the furniture itself, though it applied also to the future effects. You should have required that point to be left to the jury.]

PARKE, B.—As the amount of damages has been referred, it is better that the whole matter should go before a legal arbitrator, otherwise there must be a new trial. The arbitrator will take the law to be that which the Court lays down—that, if the agreement was to mortgage certain specific furniture, of which the corpus was ascertained, that would constitute an equitable title in the defendant, so as to prevent its passing to the assignees of the insolvent, and then the assignment would make that equitable title a legal one: but, if it was only an agreement to mortgage furniture to be subsequently acquired—to give a bill of sale at a future day of the furniture and other goods of the insolvent—then it would cover no specific furniture, and would confer no right in equity. While the argument was going on, I have had an opportunity of consulting a very high authority, and it must be taken that the rule in equity is as I have stated it. If the parties decline to refer the whole, there must be a new trial.

Erle and Bompas, Serjt., appeared in support of the rule.

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1838.

WRIGHTSON v. BYWATER and Others.

THIS was an action of trespass, and stood for trial at the Leicester Summer Assizes, 1835; but was referred, by order of Nisi Prius, to an arbitrator, who was to settle all matters in difference between the parties at law *and in equity*, and to order and determine what he should think fit to be done by either party respecting the matters in dispute, the parties agreeing to be bound and concluded by such determination, and to remain contented and satisfied therewith; so as the said arbitrator should make and publish his award in writing concerning the premises, ready to be delivered to the parties, or *if either of them should be dead before the making of the award, to their respective personal representatives*, who should require the same, on or before the first day of Michaelmas Term then next. Provision was then made for the costs of the cause and of the reference, and power given to enlarge the time for making the award from time to time as occasion should require, &c.: and the arbitrator was to be at liberty to *make one or more awards, at his discretion*. At the time of this submission, two suits in equity were pending, in which the parties to this cause were concerned, and in which certain infants were interested; and there were also other matters in difference between them. On the first meeting before the arbitrator, the defendants' counsel being absent, a postponement of the refer-

By an order of reference, a cause was referred to an arbitrator, who was to settle all matters in difference between the parties at law and in equity, and to order and determine what he should think fit to be done by either party respecting the matters in dispute; so as he should make and publish his award by a day specified, (with power to enlarge the time for making it), ready to be delivered to the parties, or, if either of them should be dead, to their respective personal representatives. And the arbitrator was to be at liberty to make *one or more awards at his discretion*.

At the time of this submission, two equity

suits were pending, in which the parties to the action were interested, and in which certain infants were also concerned; and there were also other matters in difference between them. Before any award was made, L., one of the parties to the equity suits, died.

The arbitrator made an award within the time limited by enlargement, whereby he ordered that a verdict should be entered for the plaintiff, damages 500*l.*, and that the defendants should pay that sum to the plaintiff, as well as the further sum of 350*l.*, for *grievances not included in his declaration*.

On motion to set aside a judgment and execution sued out on the award (the enlarged time having expired):—*Held*, first, that the award was sufficiently final, although it did not dispose of the equity suits; secondly, that it was not invalidated by the circumstance that infants were parties to those suits; thirdly, that the arbitrator's authority was not revoked by the death of L.; fourthly, that the award of the 350*l.* was sufficiently certain.

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ence was applied for; as a condition of which, the arbitrator required that the defendants should lodge in a banker's hands the sum of 730*l.*, to abide the event of the award, which was accordingly done. The time for making the award was enlarged from time to time to the first day of Michaelmas Term, 1836. In the meantime, a plaintiff in one of the equity suits, one Thomas Linaker, died. On the 17th June, 1836, the arbitrator made an award, whereby, after reciting the order of reference, he ordered and directed that a verdict should be entered for the plaintiff upon all the issues, damages 500*l.*; and he further ordered that the defendants should pay or cause to be paid to the plaintiff the said sum of 500*l.*, as well as the further sum of 350*l.*, which he awarded to be paid by the defendants to the plaintiff as damages *for grievances not included in the plaintiff's declaration*. The award then provided for the costs of the cause, and of the reference and award. In Michaelmas Term, 1836, a rule was obtained for setting aside the award, on the grounds that it was not final, as not having disposed of the suits in equity; that the infant parties to those suits were not bound by the submission; that it was revoked by the death of Linaker, and that the award of the 350*l.* *for other grievances*, was not sufficiently certain. That rule, however, after argument, was discharged, the majority of the Court expressing an opinion that the award was good, and holding that at all events they would not set it aside on motion. Judgment having been afterwards entered up on the award, and execution sued out for the balance awarded beyond the 730*l.*, a rule nisi was obtained for setting them aside, on the same grounds as were stated in the former rule. In last Michaelmas Term,

Goulburn, Serjt., and *Humfrey* shewed cause, and contended that the award was sufficient, although the equity suits were not disposed of, the arbitrator having express power given to him to make one or more awards; and

that, the difficulty having existed that there were infant parties to those suits, the very object of that provision was to enable him to make separate final awards on the matters to which no such objection applied; that the clause providing for the delivery of the award to the personal representatives of the parties, prevented the death of Linaker from being a revocation of the arbitrator's authority—*Clarke v. Crofts (a)*; and that the award of the 350*l.* was sufficiently specific.

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Sir *W. Follett* and *Hoggins*, *contrà*.—First, the award is not final and conclusive. The suits in equity, as well as that at law, are specifically mentioned in the submission, and they are all referred, so as the arbitrator *settle them* on or before the first day of Michaelmas Term then next, &c. The arbitrator cannot now make any further award than this, because the time has not been so enlarged as to permit him to do so. He has awarded on some of the matters referred,—the action at law and other grievances connected therewith: he cannot award as to the rest. If this award be good, he might have awarded on any one subject-matter in difference, however minute, between some of the parties only, omitting all the rest. The meaning of the clause giving him power to make one or more awards, is, not that he shall have power to make several final awards, but that, being authorized to direct what shall be done by the parties respecting the matters in dispute, he may make awards regulating their proceedings in the meantime, before he makes his final award. The object of the parties, and the consideration for the submission, clearly was, that *all* the matters in difference should be awarded upon. For aught that appears, the determination of the suits in equity might have entirely prevented the award as to the 350*l.* The authorities all lay it down, that awards are not binding which do not determine all the matters in differ-

(a) 4 Bing. 143; 12 Moore, 349.

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ence referred, because they do not put an end to the litigation between the parties: *In the Matter of Tribe* (a), and the cases there cited.

Secondly, this submission was not mutual, because the infants were not bound: *Biddell v. Dowse* (b). The validity of the arbitration depends on this, that all the parties mean to have all the matters in difference settled by it. The order in reference in *Biddell v. Dowse* contained the same clause as this, enabling the arbitrator to make one or more awards. An award cannot be binding, unless a previous binding submission be shewn, which will enable the arbitrator to decide on all the matters in difference: *Marsh v. Wood* (c); *Pearse v. Pearse* (d); *Hayward v. Phillips* (e).

Thirdly, the authority of the arbitrator was revoked by the death of Linaker. He professes to award as to matters in difference not included in the action; Linaker may have been a party to them. But, whether he was or not, on his death, the arbitrator had no authority afterwards to make an award between the other parties. The clause for delivery of the award to the personal representatives does not cure the difficulty; they cannot be bound so fully as the parties themselves. In the case of a dispute as to a particular chattel, as in *Marsh v. Wood*, the executor would not be bound. It must depend on his assets what his liabilities are. He could not be compelled to perform the award if it were against him; no attachment could be moved for against him. "If, by matter ex post facto, a submission becomes ineffectual as to one party, it must be altogether void"—Per Lord Tenterden, C. J., in *Marsh v. Wood* (f).—They referred also to *The Orphan Board v. Van Reenen* (g).

(a) 3 Ad. & El. 295.

(b) 6 B. & Cr. 255; 9 D. & R. 404.

(c) 9 B. & C. 659; 4 Man. & R. 504.

(d) 9 B. & Cr. 484.

(e) 1 Nev. & P. 288.

(f) 9 B. & Cr. 664.

(g) 1 Knapp's Pr. Council Rep. 83.

Lastly, the award of 350*l.*, for other grievances, is uncertain. It does not state what the grievances were, and does not pretend to be a final adjustment of them. [*Parke, B.*—There is no doubt in the mind of the Court as to this point. The award, as to this part, is only between the plaintiff and the defendant in the action; and what the grievances were would appear by the parol evidence before the arbitrator. *Id certum est quod certum reddi potest*; on shewing what the claims brought before the arbitrator were, the award is final as to them; the plaintiff is entitled to 350*l.* for them, and no more.]

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Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—This was an application to the Court to set aside a judgment entered up pursuant to an award, on a submission by rule of Court, and a *fi. fa.* thereon; and for a return of a part of the money deposited with the sheriff, upon the execution of the *fi. fa.* The case has been several times before the Court in its earlier stages, and last of all upon a motion to set aside the award, which the Court refused, the majority intimating a strong opinion that it was good, but deciding merely, on that occasion, that it ought not to be set aside, but the parties left to contest its validity, where that necessarily would come in question. On this application to set aside the judgment and execution, we must determine the validity of the award, for there is no other way than by this motion, in which the defendants can contest the legality of that judgment and execution. We are of opinion that, under the circumstances of this case, the award is good.

It appears from the affidavits that this action stood for trial at the Summer Assizes, 1835; that, besides the sub-

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ject of it, there were other matters in dispute between the parties to the action ; and there were also pending two suits in Equity, *Linaker v. Lacey*, and *Lacey v. Lacey*, in which suits infants were concerned ; but who were the parties to these suits (except that one Thomas Linaker was a plaintiff in one), or in what way those suits were connected with the subject of the action, does not appear ; and therefore we cannot assume them to have any connexion, except so far as appears by the submission to the reference hereinafter mentioned. When the cause came on for trial, an order of reference was made, of which this is the substance. [His Lordship stated the order]. Soon after this, the defendants deposited 730*l.* to abide the reference, and by their attorney attended the prior and subsequent meetings. On the 27th December, 1835, Linaker died.

On the 17th June, 1836, the arbitrator made his award. [His Lordship read the award]. After this award the 730*l.* was received by the plaintiff, and judgment was signed, and execution issued for the balance awarded, and costs.

The objections to the award were :—First, that it was not *final*, because the Chancery suits were not disposed of :—Secondly, that the submission was not *mutual*, because infants were parties, and were not bound, nor could be :—Thirdly, that it was revoked by the death of Linaker, one of the parties :—Fourthly, that it was void as to the 350*l.* awarded for other grievances, as not being sufficiently certain. The last of these objections was disposed of during the argument, and it is unnecessary to say any thing more upon it.

With respect to the other three, the first is wholly founded on the assumption, that, in order to make the award valid, it is necessary that every matter in difference should be decided by it ; and, if that assumption is incorrect, the objection fails. The other two depend *mainly*,

but not *entirely*, on the same assumption. The death of Linaker affects only the authority to determine that suit in which he was a party; and therefore, even supposing that, notwithstanding the clause in the submission providing for the death of any party, the power to award upon that suit is revoked; yet, if an award upon that suit be not essential to the validity of the award on other matters, the award may nevertheless be good. So, in like manner, if the determination of those matters in which the infants have an interest be not necessary to the decision of those in which they have none, the want of such decision would be immaterial. If it be said that it was a part of the consideration for the defendants' promise to refer the suits and the actions, that the arbitrator should have a *continuing power* to decide all the suits; the answer is, that such was not the case, for all the parties contemplated that the reference should go on notwithstanding the death of a party, of which the express provision binding the executors is a proof, whether that provision would be effectual or not to make an award in that particular suit valid. So, if it be argued that the agreement, on the behalf of all the parties to all the suits, to give the arbitrator power to decide, was also a part of that consideration, and that the want of a binding consent of the infant parties caused the failure of the consideration; the answer is, that all parties well knew that there were infant parties, and, as they must be presumed to know the law, they knew *they* were not bound by the attorney's consent on their behalf, and therefore they had all the consideration which they had stipulated for, and the consent of those parties who could and did consent, was a sufficient consideration in point of law for their promise.

The question, therefore, is reduced to this—whether, under this reference, it is necessary to the validity of any award to be made pursuant to it, that it should decide all

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the matters in dispute. And this is a mere question of construction, for there is no rule of law requiring it ; its necessity arises from the contract of the parties. The old rule was, that, unless the submission expressly made it conditional with an " *ita quod*," an award of part only was good. This was laid down by Lord *Coke*, in *Ormelade v. Coke* (a), and it was so held in *Dyer*, 242, b., *Baspole's case* (b), and many other cases. In more modern cases, it has been said that an *express* condition is not required ; for, in *Bradford v. Beavan* (c), C. J. *Willes* says, " I am willing to carry it as far as it has been carried already, because, were it not for the cases, I should be of opinion, that, when all matters are submitted, though *without such condition*, all matters must be determined ; because it was plainly not the intent of the parties that some matters only should be determined, and that they should be left at liberty to go to law for the rest." But beyond this the cases have not gone ; and it is still the question, whether the parties intended all to be decided. In *Simmonds v. Swain* (d), *Chambre, J.*, says :—" A great deal of nicety prevailed in the old cases respecting awards ; but the rigour of that interpretation has for a long time been gradually relaxing ; and the Courts are now come to a mode of considering them more consonant to common sense. But, even in the earlier cases, so long since as in *Rolle's Abridgment*, *Arbitrament*, L., it was in some cases held, that, unless there was a clause *ita quod fiat de præmissis*, it was sufficient to make the award good, that one point was decided, provided that it was not necessary, in order to make the award just, that the others should be decided also. In the case of *Payne v. Cook*, adjudged many years since in the Exchequer Chamber, many points relating to awards were decided on, and amongst others, this general doctrine was strongly laid down—that,

(a) Cro. Jac. 355.

(b) 8 Coke, 98.

(c) Willes, 270.

(d) 1 Taunton, 554.

as there was no clause in the submission providing that the award should be made on all points submitted, if the matters omitted were not necessarily dependent on and connected with the other points, the award should be sustained."

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The point to be decided, then, is, whether this submission requires the award to be made of all matters in dispute. In ascertaining its meaning, every part is to be construed together; and when we find a clause that the arbitrator is to have power to make "*one or more awards at his discretion*," we cannot doubt but that the arbitrator might make a valid award on one entire subject of dispute. For it cannot be supposed that such separate awards, when made, were not intended to be binding from the time they were made: it is impossible to imagine they were to be ambulatory till the last was made: and the case is very different from that of a reference with power to regulate the intermediate enjoyment, or to give directions respecting the intermediate management of some subject of dispute, which, from their very nature, are meant to have a temporary operation only. This is a provision that the arbitrator may make one or more final awards.

We therefore think, that, in this case, the parties have given the *power* to the arbitrator to dispose of all matters, but have not made it a *condition* that all matters should be disposed of by him.

The only case which is necessary to consider, as opposed to this view of the question, is that of *Biddell v. Dowse*, where in fact there was a similar clause in the agreement of reference. But it is quite enough to say that this point was never argued or considered in the Court of King's Bench; and we cannot take the judgment as a binding authority upon a point which was never brought before the Court. The rule therefore will be discharged.

Rule discharged.

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CLARKE and Another v. WILSON.

Assumpsit against the maker of a promissory note. Plea, that it was a joint and several note made by the defendant and T. S., and that the defendant entered into it at the request of T. S., and for his accommodation, and in order that he might get it discounted by the plaintiffs; that the defendant had no other value or consideration for making it, and that he made it as a mere surety for T. S., of which plaintiffs had notice; and that, although the note was due in the hands of the plaintiffs for six months, yet the defendant had no notice, till the commencement of this suit, of its nonpayment by T. S.; and that the plaintiffs gave time for payment to T. S., to the prejudice of the defendant: *Held* bad on general demurrer.

ASSUMPSIT on a promissory note for 200*l.* dated 15th April, 1836, made by the defendant, payable to the plaintiffs or order three months after date. Plea, that the promissory note in the declaration mentioned was and is a promissory note made and entered into by the defendant and one Thomas Scott the younger, whereby the defendant and the said T. Scott jointly and severally promised the plaintiffs to pay them the said sum of money in the said note specified, at the time in the said note and in the declaration mentioned, and that neither before nor at the time of the making of the said note was either the defendant or the said T. Scott in any way liable or indebted to the plaintiffs for or in respect of any sum of money whatsoever, or on any other account. And the defendant says, that he entered into the said note and became a party thereto at the request of the said T. Scott, and for his accommodation, and in order that he might procure the same to be discounted by the plaintiffs, and that the plaintiffs did thereupon discount the same for the said T. Scott, and that he, the defendant, did not at any time have or receive any value or consideration for the making of the said note, save and except so far as relates to or concerns the discounting of the said note by the said plaintiffs for the said T. Scott, for the exclusive use and benefit of the said T. Scott; and that he the defendant made and signed and delivered the said note as a mere surety for the said T. Scott, and for the better security to the said plaintiffs for the due payment to them of the sum therein specified, and not for and on account of any other matter whatsoever; of all which premises the plaintiffs then had full and due knowledge and notice. And the defendant further says, that, although the said note became and was due in the hands of the plaintiffs, accord-

ing to the tenor and effect thereof, for a long space of time, to wit, for six months before the commencement of this suit, yet he the defendant, before the commencement of this suit, had no notice whatever of default having been made by the said T. Scott in payment of the sum of money in the said promissory note specified : and that heretofore, to wit, on &c., to the great wrong, prejudice, and injury, and without the knowledge or consent of the defendant, the plaintiffs allowed and granted to the said T. Scott longer and further time for the payment of the monies in the said note specified, than in the said note mentioned. Verification.

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To this plea there was a replication, alleging that the liability of the defendant as a maker of the note was not in any way varied or altered by any instrument or memorandum *in writing*, or by any other agreement whatsoever. The defendant rejoined, reasserting that he entered into the note as a surety for the said T. Scott, under the circumstances in the plea mentioned, and that the plaintiffs gave time for payment to Scott, wrongfully, and without the consent or knowledge of, and injuriously to the defendant, as in the plea mentioned. The surrejoinder alleged that the plaintiffs did not give time for payment to the said T. Scott, in manner and form as in the rejoinder alleged. To this the defendant demurred specially, on the grounds that the surrejoinder was a departure from and repugnant to the replication, and raised an issue of law instead of fact. Joinder in demurrer. On the part of the plaintiff, the following point for argument, amongst others, was noted in the margin :—That the plea is insufficient in law, for omitting to state that there was an agreement in writing, whereby it was provided that the defendant should be liable on the note as surety only ; and that it seeks to contradict the absolute written promise contained in the note, by matter in parol only.

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R. V. Richards appeared to support the demurrer.

[*Parke, B.*—There is one clear objection to the plea, that the mere giving of time in the manner therein mentioned is no discharge of any party collaterally liable. On that ground the plea is bad on general demurrer]. The plaintiff having pleaded over, the word *granted* will sufficiently import that there was a consideration for the giving of time. [*Parke, B.*—Do you contend that that imports a deed? It does not appear what it was a conveyance of, unless of *time*].

Lord ABINGER, C. B.—The plea should have set out some contract that was binding on the plaintiff. All that it states is, that he waited six months before he commenced his action.

Per CURIAM,

Judgment for the plaintiff.

THIMBLEBY v. BARRON.

A covenant
not to sue
upon a simple
contract debt
for a limited
time is not
pleadable in
bar of an ac-
tion for such
debt.

DEBT in 1500*l.* for money paid, in 92*l.* for interest, and in 1600*l.* for money found to be due on an account stated. Plea, as to the first and second counts, that the said sum of 1500*l.* in the first count mentioned was and is the amount of certain monies paid by the plaintiff for the defendant's use, under and by virtue of a certain bond or obligation mentioned and recited in the deeds hereinafter in this plea mentioned; and that the plaintiff claims the interest in the second count mentioned, and the same accrued after the making of the deed of the 21st June, 1831, hereinafter mentioned, upon and for the forbearance of the said monies so paid by him the plaintiff for the defendant's use, under and by virtue of the said bond; and that the plaintiff paid 750*l.*, parcel of the said sum 'of

1500*l.*, at one time, and the residue of the said sum of 1500*l.* at another time, to wit, to Edward Blithe Vise, hereinafter mentioned. And the defendant further saith, that after the plaintiff had paid to the defendant's use part of the said monies, to wit, 750*l.*, parcel of the said sum of 1500*l.*, and before he had paid for the defendant's use any part of the residue of the said sum of 1500*l.*, to wit, on the 21st day of June, 1831, by a certain deed then made, sealed with the respective seals of the plaintiff and defendant, and bearing date on the last-mentioned day, after reciting, that, in consequence of a certain family relationship subsisting between the plaintiff and the defendant, the plaintiff, by way of advancing the said defendant in life, did, at the special instance and request of the defendant, become bound with him in a certain bond or obligation, bearing date on or about the 1st day of March, 1828, unto Edward Blithe Vise, in the penal sum of 3000*l.*, with a condition thereunto subscribed for making the same void on payment of the sum of 1500*l.*, with such interest for the same, by such instalments or payments, and at or on such days or times, and in such manner and form, as are therein particularly expressed: and further reciting, [here the deed recited an indenture of assignment by the defendant to the plaintiff, dated 6th April, 1829, of a policy of insurance for 1500*l.* on the defendant's life, subject to a proviso for re-payment thereof by the plaintiff, his executors, &c., to the defendant, his executors, &c., or as he or they should direct, on payment by the defendant, his heirs, executors, or administrators, of the said principal sum of 1500*l.*, with the interest thereof, pursuant and according to the tenor and effect of the said bond, and the condition thereof; and also on the defendant, his heirs, executors, or administrators, saving harmless and keeping indemnified the said plaintiff, his heirs, &c., of and from all damages, sum and sums of money, costs, charges, and expenses whatsoever, which he or they, or

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any of them, should or might sustain or be put unto, or be liable to pay, by reason or on account of him the plaintiff being bound with the defendant for the payment of the sum of money and interest aforesaid]: and further reciting, that the plaintiff had lately paid (the said defendant having been unable so to do) to the said Edward Blythe Vise the sum of 750*l.*, (being parcel of the said sum of 1500*l.* in the said first count mentioned), on account and in part discharge of the money secured to him by the said thereinbefore recited bond or obligation, so that there then only remained due and owing to the said Edward Blythe Vise the principal sum of 750*l.*, upon or in respect thereof: and further reciting, that, as it would be inconvenient to the defendant to pay the said remaining sum of 750*l.* to the said Edward Blythe Vise at the time fixed upon by them for that purpose, the plaintiff had agreed to pay the same, and to enter into such covenants as are thereafter contained, in consideration of the said relationship existing between the plaintiff and the defendant as aforesaid, and in consideration of the said indenture of assignment of the 6th day of April, 1829, being made and executed by the defendant to the plaintiff by way of indemnity or security as thereinbefore recited: he the plaintiff, for himself, his heirs, &c., did thereby covenant and agree with and to the defendant, his executors, administrators, and assigns, by the said deed now in recital, in manner following, (that is to say), that he the plaintiff, his heirs, &c., or some or one of them, should and would, when called upon or requested so to do, well and truly pay or cause to be paid unto the said Edward Blythe Vise, his executors, &c., the said sum of 750*l.*, (being the residue of the said sum of 1500*l.* in the declaration mentioned), and all interest which might be then due for the same, in full discharge, and according to the purport and effect of the said thereinbefore recited bond and the condition thereof, and would not ask or require the said

defendant to join him or them in such payment : and also that he the plaintiff, his executors, &c., *should not nor would, before the expiration of ten years from the date thereof, and which have not yet elapsed*, if the said defendant should so long live, *call in, demand, or compel payment of the said sum of 750*l.* already advanced, or of the said sum of 750*l.*, residue of the said sum of 1500*l.** in the declaration mentioned, and interest thereon, to be advanced by him in manner aforesaid, or for any part thereof, *nor would use or take any ways, means, or proceedings whatsoever for obtaining the possession or receipt of the same sums or any part thereof*: and further, that he, the plaintiff, his executors, &c., should and would from time to time and at all times thereafter during the said term of ten years, if the said defendant should so long live, accept and take any sum or sums on account and in part payment of the money which he had already advanced or paid, or might thereafter advance or pay to the said Edward Blythe Vise for the use of the said defendant as aforesaid, by such instalments, in such proportions, and at such times, as it should or might be convenient for the defendant to pay the same or any part thereof; and that thereupon he the plaintiff, his executors, &c., should and would give to the defendant a receipt or receipts, or other proper discharge or discharges, for the money which he or they might from time to time receive from the defendant under and by virtue of the said deed : and lastly, that, so soon as the said defendant should have paid him the plaintiff, his executors, &c., all money which he or they might have advanced for the use of the said defendant as aforesaid, with lawful interest for the same, he or they would reassign the said thereinbefore recited policy of insurance to the defendant, or as he might direct, or, in case of the death of the defendant before or at the expiration of the said term of ten years, he the plaintiff, his executors, &c., should and would, immediately after that

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event, take the proper and necessary steps for recovering and receiving the said sum of 1500*l.* insured upon the life of the defendant as aforesaid, and assigned to him the plaintiff in manner before expressed, and would (after deducting all costs and charges which he or they might have been thereby put unto, and all principal money which might then remain unpaid by or due and owing from the defendant to him) pay over the residue or surplus of the money to be recovered or received under or by virtue of the said policy of insurance, to the executors or administrators, or assigns of the said defendant, or as he or they might direct: and it was and is thereby further declared and agreed, that, although the plaintiff had for himself, his heirs, &c., by the said deed covenanted and agreed not to require, before the expiration of ten years from the date thereof, the payment of any principal sum or sums of money which might from time to time be due and owing to him or them from the defendant in manner above mentioned; yet it was not intended that the said covenant should extend to preclude him, the plaintiff, his executors, &c., from demanding or compelling payment *of interest* for the said advances; and therefore he the defendant did thereby for himself, his heirs, &c., covenant, promise, and agree with and to the plaintiff, his executors, &c., that the defendant, his heirs, &c., should and would half-yearly, on the 21st day of June and the 21st of December in every year during the said term of ten years, pay or cause to be paid to the plaintiff, his executors, &c., lawful interest for all such sum and sums of money as might from time to time during the said term be advanced by the plaintiff, his executors, &c., for his use as aforesaid; and also should and would pay all annual sums or premiums necessary for keeping the above-mentioned policy of insurance on foot, pursuant to the covenant for that purpose contained in the said recited indenture of the 6th day of April, 1829. Verification.

General demurrer, and joinder.

W. H. Watson appeared to support the demurrer, but the Court (*Parke, B.*, having referred to *Ayloffe v. Scrimshire (a)*), called upon

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Cresswell to support the plea.—The plea not only shews an engagement on the part of the plaintiffs not to sue, but the consideration for that engagement; it appearing on the face of the pleadings that this is an action for a mere simple contract debt. There is no suggestion that the defendant has not kept up the policy of insurance. His doing so, therefore, constitutes a valid and existing consideration for the agreement to forbear suing. It is clear that a covenant not to sue generally operates as a release of the debt. If so, why should not a covenant not to sue on a simple contract debt for ten years, operate as at least a suspension of the right of action for that time? It is true, the reason assigned in the former case is, to avoid circuity of action, because the damages recoverable by each party would be equal. But so also would they here, because the defendant would be entitled to recover, for the breach of the contract not to sue, all the damages he has sustained by the action being brought before the expiration of the time limited; that is, all that the plaintiff has recovered thereby. The distinction is certainly taken in the earlier cases between an absolute covenant not to sue, and a covenant not to sue for a term limited: 1 Roll. Abr. 939; *Hodges v. Smith (b)*; [*Parke, B.*—And expressly by Lord *Holt* in *Ayloffe v. Scrimshire.*] But a difficulty, which does not appear to have been adverted to in the cases, appears to exist by reference to the case of a surety, who is held to be discharged, not only by the taking of a composition from the principal debtor, but also by the giving time to him for good consideration, on the ground that, during the time, the creditor is precluded from suing

(a) Carth. 63; S. C. 1 Show. 46; Comb. 123; 2 Salk. 573.

(b) Cro. Eliz. 623.

Esch. of Pleas, 1838. the principal: *Davey v. Prendergrass* (a) *Lewis v. Jones* (b).
 THIMBLEBY v. BARRON. [Lord Abinger, C. B.—The breach of the agreement to forbear suing renders the party liable in damages, but it is not pleadable in bar. Parke, B.—The situation of the surety is altered by giving time to the principal, because it is the duty of the creditor not to tie his hands up against the principal, but to take all due remedies against him: *Ex parte Gifford* (c)]. But the argument on the other side must be, that in this case the plaintiff's hands are not tied up. [Parke, B.—Yes; because he is liable to an action on his contract.] In *Howell v. Jones* (d), the taking an acceptance from the principal debtor (to whom the plaintiffs, who were bankers, had made advances on the guarantee of the defendant) was held to discharge the surety, although it was not a satisfaction of the original debt, and could not be pleaded as such. [Parke, B.—The books are full of authorities against you (e)].

Per CURIAM,

Judgment for the plaintiff.

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| (a) 5 B. & Ald. 178; 2 Chit. R. 336. | Eliz. 352; <i>Lacy v. Kynaston</i> , 2 Salk. 575; 2 Ld. Raym. 959; |
| (b) 4 B. & Cr. 506; 6 D. & R. 567. | <i>Smith v. Mapleback</i> , 1 T. R. 446; <i>Burgh v. Preston</i> , 8 T. R. 486; |
| (c) 6 Ves. 805. | <i>Dean v. Newhall</i> , Ibid. 168; 2 Saund. 47, t. |
| (d) 1 C. M. & R. 97. | |
| (e) See <i>Deus v. Jefferies</i> , Cro. | |

GOVER v. ELKINS.

Where the defendant takes out a summons to stay proceedings on payment of a certain sum, which the plaintiff refuses, alleging more to be due; and the defendant does not afterwards bring the money into Court; the plaintiff will not therefore be liable to the costs subsequent to the summons.

ROWE moved for a rule calling on the defendant to shew cause why he should not pay the sum of 150*l.* into

Court, and amend his pleas by adding a plea of payment thereof into Court, or else why the plaintiff should not be relieved from the payment of costs. The action was in assumpsit, the amount claimed by the writ being 289*l*. The declaration was delivered on the 20th of November, containing counts for work and materials, goods sold and delivered, money paid; and on an account stated. On the 19th of December, the defendant took out a summons to stay proceedings on payment of 150*l*., beyond the sum of 28*l*., the amount of an alleged set-off; but the plaintiff declined to take the 150*l*., alleging that more was due to him; and the summons was indorsed accordingly. The defendant afterwards pleaded non assumpsit, and a set-off of 28*l*., but did not pay the 150*l*. into Court, or put upon the record any plea of payment or tender. Application was made to the Master (Mr. Collett) as to the practice in such a case, and he having stated that the offer to pay made before the Judge, on the hearing of the summons, would render the plaintiff liable to all the costs subsequent to the date of the summons, the present application was in consequence made to the Court.

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PARKE, B.—I do not think the rule of practice applies to such a case as this. The ground on which the Court proceeds is this: if, after an offer by the defendant to pay a given sum, and a refusal on the part of the plaintiff to accept it, the defendant pays the money into Court, and the plaintiff then takes it out, that is *prima facie* evidence of oppression on his part, and subjects him to the costs, unless he explains his conduct to the satisfaction of the Court; but, if the defendant, after such a refusal, goes down to trial on other grounds, I am not aware that the Court have ever made the plaintiff pay costs. The impression of the Master has probably arisen from a misapprehension of some orders that were made (but I believe not of late), that, where the sum tendered was refused,

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ALDERSON, B.—The rule is imperative, and, to bring himself within it, the defendant must bring the money into Court.

Rule refused.

JONES, *qui tam* &c., v. EDWARDS.

The Court allowed the declaration in a penal action (against a magistrate for acting without a qualification) to be amended after special demurrer, on the terms of the defendant's pleading *de novo*, and the plaintiff's undertaking to try at the next assizes; although the declaration had already been once before amended on the plaintiff's application, and although the defendant produced affidavits that the plaintiff was a person in indigent circumstances, and that he (the defendant) was advised and believed that he had a good defence on the merits.

THIS was an action of debt on the statute 18 Geo. 2, c. 20, s. 3, to recover from the defendant a penalty of 100*l.*, for acting as a magistrate for the county of Merioneth, without having a sufficient qualification. The declaration was delivered on the 26th October, with notice of trial for the second sittings in Michaelmas Term, the venue being laid in Middlesex. On the 4th November the defendant pleaded not guilty. The error in the venue being subsequently discovered, a summons was taken out to amend the declaration, by inserting Merionethshire as the venue instead of Middlesex, and on the 16th November an order was made for such amendment, the defendant having liberty to plead *de novo*. The defendant thereupon, on the 22nd November, delivered a special demurrer to the declaration, on the ground that the particular acts which the defendant was charged to have done as a magistrate were not set forth. The plaintiff (after twice obtaining time to join in demurrer) took out, on the 7th December, a summons to amend the declaration by inserting a statement of the acts charged to have been done by the defendant as a magistrate. The summons was heard before Gurney, B., who, after conferring with some others of the judges, refused an order. A second summons for the same purpose was then taken out before Parke, B., and on the 15th December that learned Judge made an order to stay

the proceedings till the 4th day of term, in order that an application might be made to the Court.

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Welsby having accordingly obtained a rule to shew cause why the declaration should not be amended,

Cresswell shewed cause, and produced affidavits stating that the plaintiff was in indigent circumstances, and totally unable to pay any costs, and that the defendant was advised and believed that he had a good defence on the merits.—This is not a case in which the amendment sought ought to be allowed. The discretion of the Court is exercised more rigidly in penal than in other actions. The law does not favour common informers: they are limited as to the time of suing and as to the venue. [*Parke, B.*—*Mr. Tidd (a)* states the rule to be now the same in penal as in other actions, unless it be shewn that there has been unnecessary delay. The only class of cases in which amendments are not made are real actions, and even as to them there have been exceptions in extreme cases.] The plaintiff shews nothing to satisfy the Court that he has a right to sue; on the other hand, the defendant swears that he believes he has a good defence on the merits. In *Matthews v. Swift (b)*, which was an action against an attorney for penalties, for practising without having entered his name on the roll, the Court, although they were aware from a previous discussion that the defendant had committed a breach of the law, refused to allow the plaintiff to amend the declaration after special demurrer. So, in debt against a sheriff's officer for extortion, under the 32 Geo. 2, c. 28, the Court refused to allow the declaration to be amended by inserting new counts on the 23 Hen. 6, c. 9; *Wright v. Ager (c)*. At all events, the amendment ought to be made only on the

(a) *Tidd's Pr.* 711.

(b) 1 Scott, 706; 1 Bing. N. C. 735.

(c) 5 Moore, 330.

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terms of the defendant's pleading *de novo*, and the plaintiff's undertaking to try at the next Assizes, and giving security for costs.

Jervis and Welsby, in support of the rule, were stopped by the Court.

PARKE, B.—On hearing this matter discussed, I believe we are all of opinion that it is almost a matter of course to amend before trial, in penal as in other actions: the only established exception seems to be the case of unnecessary delay, which certainly does not exist here. We think that the amendment should be made on payment of costs, and on the terms of the defendant's pleading *de novo*, and the plaintiff's undertaking to go to trial at the next Assizes: we should be disposed also to add the term that he should find security for costs, if there were any precedent for it; but we ought not to create such a precedent.

BOLLAND & GURNEY, Bs., concurred.

Rule absolute accordingly.

PARTRIDGE v. SCOTT and Another.

If a party builds a house on his own land, which has previously been excavated to its extremity for mining purposes, he does not acquire a right to support for the house from the adjoining land of another, at least until twenty years have elapsed since the house first stood on excavated land, and was in part supported by the adjoining land, so that a *grant* by the owner of the adjoining land, of such right to support, may be inferred; for, rights of this sort can have their origin only in grant.

THIS was an action of trespass on the case; and on the trial before *Alderson*, B., at the Summer Assizes for Staffordshire, in 1834, the jury found a verdict for the

owner of the adjoining land knew or had the means of knowing that the land had been so excavated.

And *semble*, such grant ought not to be inferred until after the lapse of twenty years since the owner of the adjoining land knew or had the means of knowing that the land had been so excavated.

Therefore, the owner of the adjoining land is not liable to an action on the case, if, within such period, he works mines under his own land so near its boundary as to cause the excavated land on which the house stands to sink, and the house to be thereby injured.

plaintiff, subject to the opinion of the Court on the following case.

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The declaration contained three counts. The first stated that the reversion of certain messuages, dwelling-houses, out-houses, yards, gardens, and closes, with the appurtenances, belonging to the plaintiff, the defendants, on the 1st day of January, 1830, and on divers other days and times, &c., so wrongfully, carelessly, negligently, and improperly, and without supporting or propping up the same, worked certain mines near to the said premises, and dug for, got, and removed the mines, minerals, and other produce of the said mines, to the support of which said mines and minerals for his said premises the plaintiff was entitled, and which he of right ought to have had; and that, by reason thereof, and by and through the carelessness and improper conduct of the defendants, the foundations of the plaintiff's said premises were thereby greatly weakened and injured, and the ground on which the same stood swagged and gave way, and the walls, foundations, roofs, ceilings, joists, doors, and windows of the buildings on the plaintiff's said premises, and the earth and soil of the said premises, were shaken, displaced, rent asunder, damaged, and spoiled, and sunk, and fell; and the said buildings were in great danger of falling down, and the said premises were thereby unfit for habitation or use, or cultivation respectively; and that the plaintiff had been put to great expense in repairing and endeavouring to repair the same, &c.

The second count referred to a certain other messuage, house, yard, garden, close, and premises, in the occupation of the plaintiff, and was in all other respects similar to the first count. The third count was in trover for certain goods and chattels, to wit, earth, soil, rubbish, &c.

To this declaration the defendants pleaded separately, but the same pleas; that is to say, they pleaded—First, to the whole declaration the general issue of not guilty.

Secondly, as to the working without supporting or prop-

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ping up the mines in the first count mentioned, near to the messuages, dwelling-houses, and out-houses of the plaintiff in that count mentioned—that the plaintiff was not entitled to, nor ought he of right to have had, the support of the mines for his said messuages, dwelling-houses, and out-houses, in the first count mentioned, nor any nor either of them, nor any part thereof, &c.

Thirdly, a similar plea as to working without propping up the mines in the said first count mentioned, near to the yards, gardens, closes, &c., in that count mentioned.

Fourthly, a similar plea as to working without supporting the earth, soil, ironstone, coals, and materials, near to the messuage, dwelling-house, and out-houses, in the second count mentioned.

Fifthly, a similar plea as to the working without supporting the earth, soil, ironstone, coal, and materials, near to the yard, garden, close, and premises, in the said second count mentioned. And sixthly and lastly, to the count in trover, that the plaintiff was not possessed of as his own property the said goods and chattels, in that count mentioned.

The replication took the issues tendered in the above-mentioned pleas.

The jury found that the plaintiff was possessed of a certain dwelling-house and premises partly erected upon excavated land within four years before the injury complained of, being the house and premises to which the second count of the declaration referred, and of other houses, land, and premises, the buildings on which had been erected about thirty years before, and which were those included in the first count.

They also found that the defendants excavated so near their own boundary, (the direction of which boundary was east and west), the mines belonging to themselves, as to cause damage thereby to all the plaintiff's premises, and to cause the adjoining land of the plaintiff, not covered

with buildings, to sink also. The defendants began to work their mines after the new house and buildings of the plaintiff had been finished. They sunk their shaft or pit about one hundred yards from the plaintiff's premises on the south side thereof, and worked the coal northwards towards those premises.

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The jury also found, that, in order to have prevented any injury from the defendants' works to the plaintiff's premises, a rib of coal ought to have been left between those parts of the substrata over which the plaintiff's buildings and premises were situated, and the works of the defendants, at least twenty yards in thickness. That the defendants worked their mines leaving a rib of coal in these places of less than *ten* yards in thickness, and that they were aware that the coal had been worked out some years before on the north or plaintiff's side of their boundary, where the boundary adjoined the plaintiff's premises. That, in so doing, the defendants were guilty of negligence, in not leaving a rib of sufficient thickness, if the plaintiff was entitled to support from the defendants' land and substrata. The Court are to be at liberty to draw any reasonable conclusion that the jury should have drawn.

The question for the opinion of the Court is, whether under the above circumstances the plaintiff is entitled to recover. And if he is, then whether he is entitled to damages for the old houses and land alone, or for the more recent erections also. And it is agreed that the amount of damages shall be settled by arbitration, upon whichever principle this Court may direct.

If the Court shall be of opinion that the plaintiff is not entitled to recover, then a nonsuit or verdict for the defendants, as the Court may direct, is to be entered.

The case was argued in last Trinity Term by

W. J. Alexander, for the plaintiff.—Upon the facts set forth in the case, as well as on the express finding of the

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jury stated in the last paragraph, the defendants are found to have been guilty of *negligence*. The question therefore simply is, whether the plaintiff was entitled to lateral support from the defendants' subsoil. There are few, if any, decisions as to the right to support from the adjacent *subsoil*; the case must therefore be determined by reference to the authorities as to the right of support of adjoining buildings. In *Dodd v. Holme* (a), the question was raised, but not determined, whether a party excavating his own soil near to, but without touching, his neighbour's ground, which has been built upon to its extremity, is bound in law to protect his neighbour's foundations from being thereby weakened, either in the case of a newly built house, or of one which had stood twenty years. But it was clearly held that an action lay, it having been alleged and proved that the defendant so *negligently*, unskilfully, and improperly dug his own soil, that the plaintiff's house was thereby injured. So here, it is found that the defendants' works were carried on with *negligence*. It was undoubtedly held, in *Wyatt v. Harrison* (b), that the possessor of a house not ancient cannot maintain an action against the owner of adjoining land for digging it away, so that the house falls in; but the Court intimated, that if the complaint had been that the digging occasioned a *falling in of soil* of the plaintiff, to which no artificial weight had been added, the action would have lain. Now, the declaration in the present case contains a charge as to the falling in of soil, independently of any building; and upon that part of the case, therefore, *Wyatt v. Harrison* is an authority for the plaintiff. The case of *Jones v. Bird* (c) was very similar to the present. There it was held, that commissioners of sewers, and persons working by their order in the neighbourhood of houses,

(a) 1 Ad. & E. 493; 3 Nev. & M. 739.

(b) 3 B. & Ad. 871.

(c) 5 B. & Ald. 837; 1 D. & R. 497. And see *The Grocers' Co. v. Donne*, 3 Scott, 356.

are bound to take all proper precautions for securing them, and to shore them up if necessary; and also to give specific notice to the owners of such houses of the construction of any works likely to be dangerous to them. Here, also, the defendants were, at all events, bound to have given the plaintiff notice of their proceedings. In *Trower v. Chadwick* (a), it was held that it is a duty imposed by law upon a party pulling down his walls, adjoining to the wall of his neighbour, to use due care and skill, and take reasonable and proper precaution in doing so; so that, for want of such care, skill, and precaution, his neighbour's wall be not injured. A party is not at liberty to do what he pleases with his own, where, even remotely, he may do injury to his neighbour. [*Alderson, B.*—The difficulty is, that you have yourselves occasioned the danger, by doing what you pleased with *your own*.] But no danger then existed of doing injury thereby to any other. It is found in the case that the defendants knew the plaintiff had built on excavated ground. It is only on the supposition of their knowledge that his land was worked to the extremity, that it was necessary to leave a rib of twenty yards' thickness. [*Alderson, B.*—The question is, whether the plaintiff does not take the risk on himself, by excavating to the extremity of his ground.] It is submitted, that, on the finding in this case, the defendants were bound to leave a rib of twenty yards, they having begun to work after the plaintiff's houses were built, and with a knowledge of their being built on excavated land. In *Wyatt v. Harrison*, there was no allegation that the plaintiff had a right to have his house supported by the adjacent soil. In *Vaughan v. Menlove* (b), it was held that an action lay against a party for so negligently constructing a hay-rick on the extremity of his land, that, in consequence of its spontaneous ignition, his neighbour's

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(a) 3 Bing. N. C. 334; 3 Scott, 699. (b) 3 Bing. N. C. 468; 4 Scott, 244.

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house was burnt:—for consequences so remote, of his negligent use of his own property, is a party liable. The observations made in some of the cases, as to the inconvenience and danger of the removal of adjoining strata without notice or precaution, apply tenfold to the case of subjacent strata, where there can be no precise knowledge of the operations going on in them.

Whateley, for the defendants.—It may be admitted that careless and negligent conduct, in operations on a man's own land, which is productive of injury to his neighbour, is a ground of action: *Jones v. Bird*; *Vaughan v. Menlove*. But negligence is not found here, except as an inference of law from the facts stated. There are many authorities to shew that in the case of a *new* house, the owner is not entitled as of right to support from the adjacent soil; *Wilde v. Minsterley (a)*, *Slingsby v. Barnard (b)*, *Wyatt v. Harrison*. Then, with respect to the house which has been built above twenty years—the distinction between a new and an antient house, as to this point, was first suggested in *Palmer v. Fleshees (c)*. In *Stansell v. Jollard (d)*, Lord *Ellenborough* is said to have held, that, “where a man had built to the extremity of his soil, and had enjoyed his building above twenty years, then, upon analogy to the rule as to lights, &c., he acquired a right to support, or, as it were, of leaning to his neighbour's soil, so that his neighbour could not dig so near as to remove the support, &c.; but that it was otherwise of a house, &c., newly built.” There is, however, no other case in which it has been held either expressly or impliedly that a *grant* can be presumed from twenty years' enjoyment in such a case. And there is in truth no analogy between this case and that of antient lights, or the like; the reason of the law as

(a) 2 Roll. Abr. 564, tit. Trespass, I., pl. I. Actions (Case), (N. c.)

(c) 1 Siderf. 167.

(b) 1 Roll. Rep. 430; Vin. Abr.

(d) 1 Selw. N. P. 444, 8th ed.

to the right to light, water, &c., is, that it is a species of enjoyment which is exercised openly, and so is capable of being openly obstructed by any party disputing the right:—it is an exercise of right which the other party has always the means of shewing he does not acquiesce in: but that is not the case here; the plaintiff clearly had a right to build on his own land; but can he therefore, at the end of twenty years, preclude the defendants from mining in their own land, on the ground that he has acquired a right to support from it? Can the defendants' right to work their mines at any future time depend on this—whether the plaintiff has or has not got his minerals to his boundary? If the party is himself in fault, he cannot recover for the injury done him by his neighbour. There is no fact here from which the Court can presume any *grant*. The parties have no means of knowing what are the strata in the adjoining land, when they were excavated, or whether they may not be filled with water, which has filled up the old hollows, and so supports the superincumbent weight. And what distinction can there be between a new and an old house, except on the presumption of a grant? When, indeed, although the party had a right to do the act complained of, there has been negligence in the mode of doing it, that introduces a different question: but it clearly is not sufficient to shew merely that the damage has arisen from the act of the defendant: *Com. Dig. Action on the Case, (B. 3.)* Here there is no evidence to shew that the defendants knew that the plaintiff's houses were supported by their land.

With regard to the complaint as to the falling in of the soil, that comes to the same question: it appears that the land which has sunk is appurtenant to the buildings.

Alexander, in reply.—The answer to the argument on the other side is, that the defendants should have given notice of what they were about to do. [*Alderson*, B.—

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Jones v. Bird was the case of a merely temporary subduction of the support. Must you not shew that the giving you notice would have enabled you to escape the injury? The plaintiff could not have *shored up* his house.]

Wyatt v. Harrison is, at all events, an authority that the plaintiff has a right to recover as to the falling in of the yards and gardens. And *Stansell v. Jollard* is strongly in his favour as to the antient house.—He cited also *Brown v. Windsor* (a).

Cur. adv. vult.

The judgment of the Court was delivered in this Term by

ALDERSON, B.—The two questions in this case are of considerable importance. The facts may be shortly thus stated. The plaintiff was possessed of two houses, one an antient one, and the other built long within twenty years, before the subject of the present action occurred. These houses were built on the plaintiff's land, and considerably within his boundary; and the modern house is stated to have been built on land which had been previously excavated for the purpose of getting coal. No such statement appears in the case as to the antient house; and the Court cannot therefore intend that that house was built originally on excavated land, or that the land has been excavated more than twenty years ago.

Under these circumstances, the question is precisely similar as to both houses, and is one on which the Court do not entertain any doubt.

Rights of this sort, if they can be established at all, must, we think, have their origin in grant. If a man builds his house at the extremity of his land, he does not thereby acquire any right of easement, for support or

otherwise, over the land of his neighbour. He has no right to load his own soil so as to make it require the support of that of his neighbour, unless he has some grant to that effect. *Wyatt v. Harrison* (a) is precisely in point as to this part of the case, and we entirely agree with the opinion there pronounced.

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In this case, if the land on which the plaintiff's house was built had not been previously excavated, the defendants might, without injury to the plaintiff, have worked their coal to the extremity of their own land, without even leaving a rib of ten yards, as they have done. And if the plaintiff had not built his house on excavated ground, the mere sinking of the ground itself would have been without injury. He has, therefore, by building on ground insufficiently supported, caused the injury to himself, without any fault on the part of the defendants; unless at the time, by some grant, he was entitled to additional support from the land of the defendants. There are no circumstances in the case from which we can infer any such grant as to the new house, because it has not existed twenty years; nor as to the old house, because, though erected more than twenty years, it does not appear that the coal under it may not have been excavated within twenty years; and no grant can at all events be inferred, nor could the right to any easement become absolute, even under Lord *Tenterden's* Act, until after the lapse of at least twenty years from the time when the house first stood on excavated ground, and was supported in part by the defendants' land.

If the law stood as it did before Lord *Tenterden's* Act, (2 & 3 Will. 4, c. 71, s. 2), we should say that such a grant ought not to be inferred from any lapse of time short of twenty years after the defendants might have been or were fully aware of the facts. And even since

(a) 3 B. & Ad. 871.

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that act, the lapse of time, under these peculiar circumstances, would probably make no difference. For, the proper construction of that act requires that the easement should have been enjoyed for twenty years under a *claim of right*. Here neither party was acquainted with the fact that the easement was actually used at all; for, neither party knew of the excavation below the house. We should probably, therefore, have been of opinion that there was no user of the easement under a claim of right, and that Lord *Tenterden's* Act therefore would not apply to a case like this. However, the facts of this special case do not raise that point.

We think, upon the whole, that the defendants are entitled to our judgment.

Judgment for the defendants.

PARKER, Executrix of C. E. PARKER, deceased, v. RILEY.

When a plea to a declaration on a contract amounts to the general issue, the replication *de injuria* is bad.

Semble, that it is also bad where the plea is in avoidance of the contract itself.

But such a replication is only bad upon *special* demurrer.

Where there is a demurrer to a pleading, and the party joining in demurrer does not state in

the margin of his demurrer book any objection to a former pleading, *semble*, that he is not entitled to object to its sufficiency on the argument; especially where it is only cause of special demurrer.

ASSUMPSIT.—The declaration stated that heretofore and during the lifetime of C. E. Parker, deceased, to wit, on &c., the defendant was indebted to the said C. E. Parker, deceased, in the sum of 400*l.*, for the work and labour, care, diligence, and attendance of the said C. E. Parker, deceased, as aforesaid, by him and his clerks before that time done, performed, and bestowed as the attorney and solicitor of and for the said defendant, and otherwise, and upon his retainer, in and about prosecuting, defending, and soliciting of divers causes and suits and certain business for the said defendant upon his retainer and at his request, and for fees due and of right payable to the said plaintiff in respect thereof; and also for other the work and labour,

care, diligence, and attendance of the said C. E. Parker, deceased, as aforesaid, by him before then done, performed, and bestowed in and about the drawing, copying, and engrossing of divers pleadings, briefs, and writings for the said defendant, upon his like retainer and request, and in and about other the business of the said defendant, and for him and at his request; and also for divers journies and other attendances by the said C. E. Parker, deceased, as aforesaid, before then made, performed, and given in and about the business of the said defendant, and for him, and at his like retainer and request, &c. There were also counts for money paid, money lent, and on an account stated.

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The defendant pleaded, thirdly, as to the first and second counts of the declaration, that the said work and labour, care, diligence, and attendance in the first count mentioned were respectively done, performed, and bestowed by one Richard Stockley, and by clerks and servants employed by the said Richard Stockley by his direction and under his superintendence, management, and control, in and about the commencing, prosecuting, and defending the said causes and suits in the declaration mentioned, the same being certain causes and suits prosecuted and defended for and on behalf of the defendant by the said R. Stockley, in the name but without the control or interference of the said C. E. Parker, in his then Majesty's Courts of King's Bench and Common Pleas at Westminster; and that the said pleadings, briefs, and writings in the declaration also mentioned were drawn, copied, and engrossed in the course and for the purpose of prosecuting and defending the said causes and suits; and that the said journies and attendances in the declaration mentioned were performed and given by the said R. Stockley, and clerks and servants employed by him and by his direction, in the course and for the purpose of prosecuting the said causes and suits, and in relation

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thereto; and that the said money in the second count mentioned was money paid and disbursed by the said R. Stockley in and about the prosecution and defence of the said causes and suits: And the defendant further saith, that the said R. Stockley never was admitted to act as an attorney or solicitor in the said Courts or either of them, or in any Court of law or equity, in such manner as is directed by the statute in such case made and provided, or a person duly qualified to act as an attorney or solicitor; and he the said R. Stockley, before and for the whole period at and during which the said work and labour, care, diligence, and attendance, were done, performed, and bestowed, and the said journies and attendances were performed and given, as in the declaration alleged, was a person unqualified to act or practise as an attorney or solicitor: And the defendant further saith, that the said C. E. Parker, before and during the period last aforesaid, was a sworn attorney of his then Majesty's Courts of King's Bench and Common Pleas at Westminster; and that the said C. E. Parker, being such sworn attorney, and then well knowing that the said R. Stockley was not duly qualified to act as an attorney or solicitor, and that the said R. Stockley was such unqualified person as aforesaid, did then permit and suffer the said R. Stockley to make use of the name of him the said C. E. Parker, upon the account and for the profit of the said R. Stockley, so being such unqualified person as aforesaid; and the said R. Stockley did accordingly, in pursuance of such permission and sufferance, make use of the name of the said C. E. Parker with his privity and knowledge, and for the profit of the said R. Stockley, in and about the commencing, prosecuting, and defending the said causes and suits respectively, and in and about the drawing, copying, and engrossing the said pleadings, briefs, and writings, contrary to the statute in such case made and provided. Verification.

To this plea the plaintiff replied, that the defendant, of

his own wrong, and without the cause by him in the plea in that behalf alleged, broke his said promise in the declaration mentioned, so far as the same related to the said first and second counts thereof.

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General demurrer, and joinder.

The point stated for argument on the part of the defendant was, that the replication *de injuriâ suâ propriâ* is improper, inasmuch as the third plea does not contain matter of excuse for the breach of the promise in the declaration mentioned, but alleges facts shewing that no valid promise ever was made as alleged.

The case was argued in Michaelmas Term last by

Swann, in support of the demurrer.—The replication *de injuriâ* cannot be supported, as an answer to such a plea as the present. There are many cases which have been decided on the sufficiency of replications in this form in *assumpsit*; and the general replication has been held to be good where the plea admits the promise to be valid, but amounts only to matter of excuse for the non-performance of it: but where the plea, as here, amounts to a denial of the promise, then the replication *de injuriâ* is not applicable. *Isaac v. Farrar* (a), where the general replication was held good in *assumpsit*, is the latest case; and there the Lord Chief Baron, in delivering the judgment of the Court, refers to the former cases, and distinguishes them. He says—"No case in which the general replication has been held to be improper, resembles the present. In *Crisp v. Griffiths* (b), the plea was not matter of excuse for the breach of contract, but of subsequent satisfaction for that breach. In *Solly v. Neish* (c), the plea was a denial of the promise. So, in *Whittaker v. Mason* (d), the plea

(a) 1 M. & W. 65.

(b) 2 C. M. & R. 159.

(c) 2 C. M. & R. 335.

(d) 2 Bing. N. C. 359; 2 Scott,
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denied the contract as alleged; and although the Court intimated that it might be doubtful whether a traverse in this form was applicable to any action on promises, they abstained from deciding that question." There the replication was held good, because in the plea the defendant admitted the facts from which a promise arose, but excused himself by stating facts which rendered him not liable. It is only in such cases that this replication is admissible. [*Parke, B.*—Is not your plea bad, as amounting to the general issue?] It may be so; but it has not been demurred to, and the objection has been waived by pleading over. In *Crisp v. Griffiths*, the declaration was in debt on a promissory note; the plea was, that, after the making of the note, the plaintiff drew a bill of exchange on the defendant, which he accepted and delivered to the plaintiff, who took it for and on account of the note, and afterwards indorsed it to a person unknown to the defendant, and who, at the commencement of the suit, was the holder thereof, and entitled to sue the defendant thereon. To this there was the replication de injuriâ; and the Court held that the plea was bad, but considered it doubtful whether the replication was good. *Parke, B.*, in the course of the argument, says: "This plea does not amount merely to matter of excuse; it is more in the nature of an accord and satisfaction, though the right to sue may revive by the nonpayment of the bill." And again—"If several facts can be allowed to be put in issue by one replication, is this the right form? It appears to me that some better form ought to be adopted than the present." In *Solly v. Neish* the replication de injuriâ was held to be bad, because the plea was not matter of excuse, but a denial of the promise to the plaintiff. In the present case, the plea denies every matter from which the promise arises. [*Parke, B.*—The strength of your argument is, that this is a mere denial that the contract was made with the plaintiff,

for the plea alleges it to have been made with another person.] In *Whittaker v. Mason* (a), Tindal, C. J., says: "We think this plea, which seeks to introduce a new condition into the special promise stated in the declaration, does not admit that promise, and excuse the non-performance of it, but does in effect deny that such promise was ever made. The replication, therefore, which only proposes to deny the excuse set up in a plea, where no excuse is alleged, appears to us to be informal and insufficient." In *Noel v. Rich* (b), the plea amounted to an excuse for non-payment of the bill.

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Platt, contra.—The plea is bad on general demurrer. [*Swann.*—The defendant has had no notice that this point was intended to be argued, and without that the plaintiff is not entitled to be heard. The demurrer is to the replication. *Knowles*, amicus curiæ. In *Coleby v. Graves*, in this term in the Queen's Bench, where no notice had been given by the party who joined in demurrer, of the objection he intended to raise, the Court postponed the case that the point might be stated in the margin.] [*Parke, B.*—The rule E. 2 Jac. 2, which was revived by the rule H. 38 Geo. 3, K. B., seems to require that each party should deliver paper books, and that the points intended to be argued should be set down by the attornies of both parties (c).] Then it is to be understood that no objection is to be made to the plea. [*Alderson, B.*—The Court must deal with it without argument.] Then the replication, if bad at all, is only so on *special* demurrer.

(a) 2 Bing. N. C. 689; 2 Scott, 580.

(b) 2 C. M. & R. 360.

(c) In Tidd's New Practice, p. 452, it is said—"In the King's Bench it is a rule, that in all books to be delivered to the Judges, the exceptions intended to be insist-

ed upon in argument should be marked by the party who objects to the pleadings, in the margin of the books he delivers; and he should leave a copy of such exceptions with the two Judges to whom he does not deliver books."

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In *Isaac v. Farrar*, and *Solly v. Neish*, the objection was taken on special demurrer. But the case of *Curtis v. The Marquis of Headfort*, which was argued last term in the Bail Court (a), is precisely in point. There, to a declaration in assumpsit on a banker's cheque, the defendant pleaded that the cheque was given for money lost at play, and *de injuriâ* was held to be a good replication on general demurrer; and the Court set aside the demurrer as frivolous. All the cases that have now been cited were there fully discussed. But this plea does admit a contract, but says the work was done in such a way that the defendant is not liable to the plaintiff. It states that the work was done by Stockley and his servants without the control or interference of Parker. Suppose an attorney allows his managing clerk to employ the subordinate clerks, and to pay them; it might be said that the subordinate clerks were not under the control of the attorney himself, but of his managing clerk. That would not be an illegal employment of the managing clerk. Then the whole of the facts set forth in the plea may be admitted, as they form no excuse for non-payment by the defendant, being no infraction of the law.

Swann in reply.—As to this being a good replication on general demurrer, the case of *Hooker v. Nye* (b) is an express decision to the contrary. *Alderson*, B., there says: "The replying *de injuriâ*, when that replication is inadmissible, is most clearly matter of substance, and may be taken advantage of on a general demurrer. [*Parke*, B.—There is a case on this point in 3 *Levinz* (c).] The case of *Curtis v. The Marquis of Headfort* was merely a motion to set aside a demurrer as frivolous, and cannot have the effect of overruling cases decided expressly on the point. It is said, however, that the plea admits the contract. A plea can

(a) Not yet reported.

(c) *Fursdon v. Weeks*, 3 *Lev.* 65.

(b) 1 C. M. & R. 258; 4 *Tyrw.* See post, p. 238.

only deny the promise or the facts out of which it arises. The plaintiff's claim in his declaration is for work done by Parker: the plea denies that it was done by him, and alleges that the whole was done by Stockley. If it was done by Stockley as the agent of Parker, the plea would be untrue, and ought to have been traversed:—what is done by the agent is done by himself. In *Hopkinson v. Smith (a)*, it was held that an attorney could not recover a charge for conducting a suit in which the party charged has not had the benefit of the attorney's judgment and superintendence.

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Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—Two questions arise on this record; first, whether the general replication *de injuriâ*, to a plea of this kind, be good; and secondly, if not, whether the objection be open on a general demurrer.

We are disposed to think that the replication is bad. It is somewhat difficult to say what the precise ground of defence stated in this plea is; but it must be, either that the defendant had not the benefit of the skill and personal superintendence of the plaintiff's testator, for which he must be presumed to have contracted; or that the plaintiff was not entitled to recover on the ground of the illegality of the transaction,—or both; and on every one of these three suppositions the plea does not consist of mere *matter of excuse* for the non-performance of the contract declared on. It either amounts to the general issue, or is an avoidance of the contract itself: on the first supposition, it is clear the replication is bad; on the other, we are strongly inclined to think it so. But the second ques-

(a) 1 Bing. 13; 7 Moore, 237.

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There are conflicting authorities upon this point; but we think, upon consideration, that the objection cannot prevail unless it be assigned as a cause of *special* demurrer.

The first case in the books upon this point, is that of *Fursdon v. Weeks* (a), in which it was held, that the replication was bad on general demurrer, when it improperly put in issue several facts. But the Court appear to have proceeded upon the ground that a matter of record was thereby put in issue; (though probably this circumstance would make no difference); and besides, as is remarked in Mr. Fraser's note to *Crogate's case* (b), the case occurred before the 4 Anne, c. 16, which enacts, that on demurrer the judges shall proceed to give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission, or defect in any pleading, &c., except those which the party demurring shall set down and express together with his demurrer, notwithstanding that such imperfection, omission, or defect might therefore have been taken to be matter of substance, not aided by the 27 Eliz. c. 5. So that the statute itself shews that the reason why it was enacted, was, that too strict a construction had been put in practice on the statute of Elizabeth; and in recent cases, as Mr. Fraser correctly states, the objection seems uniformly to have been made the ground of special demurrer. In *Banks v. Parker* (c), and *Swuffe v. Solley* (d), this objection was held to be holpen after verdict by the statute of jeofails, *as matter of form*, and for the same reason, no doubt, it was likewise so held in *Collins v. Walker* (e), though matter of record was in-

(a) 3 Lev. 65.

(b) 8 Coke, 67. a.

(c) Hob. 76.

(d) 1 Brownlow, 200.

(e) Sir T. Raym. 50.

volved in the issue. This Statute of Jeofails was the 18 Eliz. c. 14, which enacted "that judgments should not be reversed for any *default in form* in any declaration, &c., suit, or demand;" words very nearly the same as those of 27 Eliz. c. 5, viz. "any defect or want of form in any declaration, or other pleading, or course of proceeding," and it would seem that if the default in question be want of form under one statute, it must be under the other.

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In conformity with this view of the case, my Brother Coleridge decided a short time ago in *Curtis v. Marquis of Headfort*, which is not reported, that the objection could not prevail except on special demurrer; on the other hand, in the case of *Hooker v. Nye (a)*, Lord Lyndhurst and my Brother Alderson held that the replication of *de injuriâ*, if bad, was bad on general demurrer; and Lord Lyndhurst said, that, in *Fursdon v. Weeks (b)*, the Court decided that the objection must prevail on general demurrer, though the statute of 27 Eliz. was then in force, which provided that the judges should give judgment without regarding matter of form, which shewed that this objection was not mere matter of form. But his Lordship does not appear to have adverted to the circumstance above mentioned, that too strict a construction had been put on the statute of Elizabeth, which appears by the statute of Anne itself to have been the reason for the enactment of that part of it which relates to special demurrer. Nor does the attention of the Court appear to have been drawn to the cases in which this objection was held to be mere matter of form under the Statute of Jeofails.

The objection in this case appears to bear a strong analogy to that of duplicity, which is clearly matter of form, Com. Dig. Pleader, Q. 4.

Upon the whole, we think that this objection ought to

(a) 1 C. M. & R. 258; 4 Tyrw. 777.

(b) 3 Lev. 65.

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Judgment for the plaintiff.

SIMPSON v. NICHOLLS.

To a count for goods sold and delivered, the defendant pleaded that they were goods sold and delivered to him by the plaintiff in the way of his trade, on a Sunday, contrary to the statute. The plaintiff replied, that the defendant, after the sale and delivery of the goods, kept them for his own use, without returning or offering to return them, and had thereby become liable to pay the sum mentioned in the plea, being so much as they were reasonably worth:—*Held* bad on demurrer.

ASSUMPSIT for goods sold and delivered, and on an account stated. Plea, as to the sum of 18*s.* 6*d.*, parcel, &c. actionem non, because the goods, the price and value whereof amounted to the sum of 18*s.* 6*d.*, parcel of the money in the first count mentioned, at the time of the sale and delivery thereof, consisted of certain wines and goods, to wit, two bottles of port, &c.; and that the plaintiff, before and at the time of the sale and delivery thereof, carried on the trade and business of a wine-merchant, and the said goods were so sold and delivered by the plaintiff to the defendant on Sunday, the 1st day of March, 1835, and in the way of the plaintiff's said trade and business, and in his ordinary calling of a wine-merchant; and the said promise to pay the price and value thereof was made on that day by the defendant to the plaintiff, in the way of the plaintiff's said trade and business, &c., upon the said Sunday, such sale or delivery not being a work of necessity or of charity, and contrary to the statute, &c. And that the sum of 18*s.* 6*d.*, parcel of the money in the last count mentioned as found to be due from the defendant to the plaintiff, and an account whereof was so stated as aforesaid, was so found to be due, and was and is the said sum of 18*s.* 6*d.*, in which the defendant is supposed to be indebted to the plaintiff for and in respect of the said goods so sold and delivered on a Sunday as aforesaid. Verification (a).

(a) There was a similar plea as alleging that it was the price of goods sold on Sunday, the 24th to 6*l.* 0*s.* 6*d.*, other parcel, &c.,

Replication, as to so much of the plea as relates to the said sum of 18*s.* 6*d.*, parcel of the money in the first count mentioned, precludi non, because, although the said goods were sold and delivered by the plaintiff to the defendant at the time and in the manner in the plea alleged, yet the defendant, after the sale and delivery of the said goods, kept and retained the same, and hath ever since kept and retained the same, for his own use and benefit, without in any manner returning or offering to return the same to the plaintiff, and thereby hath become liable to pay to the plaintiff the said sum of 18*s.* 6*d.*, the same being so much as the said goods were and are reasonably worth : And as to so much and such part of the plea as relates to the said sum of 18*s.* 6*d.*, parcel of the said sum of money in the second count mentioned, precludi non, because, although the said sum of 18*s.* 6*d.* was found to be due from the defendant to the plaintiff upon an account stated between them, as by the defendant in that behalf alleged, yet that the said account in the second count of the declaration mentioned was stated between the plaintiff and the defendant upon a different and subsequent day, to wit, upon the 25th day of April, 1835, the same not being the Lord's Day or Sunday ; and upon that accounting the defendant was then found to be indebted to the plaintiff, and in consideration thereof then promised the plaintiff to pay him the said sum of 18*s.* 6*d.*, parcel of the monies in the second count of the declaration mentioned as aforesaid, in manner and form as the plaintiff hath in his declaration in that behalf alleged, &c.

Special demurrer to the replication to so much of the plea as related to the said sum of 18*s.* 6*d.*, parcel of the monies in the first count mentioned ; assigning for causes, that the replication neither traversed or denied, nor confessed and avoided, the matters in the plea alleged ; and

May, 1835 ; which was also fol- &c., in the same terms as those
lowed by a replication, demurrer, stated in the text.

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that the plaintiff had not stated or shewn that the defendant made a *fresh promise* to pay the plaintiff the said sum of 18s. 6d.; and that the matters pleaded in the replication might and ought to have been pleaded by a formal traverse of the sale and delivery having taken place on a Sunday; and that the replication was a departure from the first count of the declaration, and, to have enabled the plaintiff to have recovered on the matters contained therein, he ought to have declared specially.

To the replication, so far as it related to the 18s. 6d. pleaded to as part of the monies mentioned in the second count of the declaration, the defendant rejoined, denying that the account was stated on a different or subsequent day to the Sunday on which the goods were sold and delivered as in the plea mentioned.

The demurrer was now argued by—

Martin, for the defendant.—The promise stated in the declaration is the ordinary promise implied by law from the sale and delivery of goods. If the contract could be supported on the grounds suggested in the replication, the plaintiff ought to have new assigned; but instead of doing so, he replies a new promise, supposed to arise from the mere detainer of the goods by the defendant. That is a departure from the declaration. *Williams v. Paul* (a), which will be relied on by the other side, is distinguishable. There the defendant, having kept a heifer which he had bought of a drover on a Sunday, and having afterwards made a promise to pay for it, was held liable on a quantum meruit. The case was determined altogether on the ground of the subsequent promise, and it is no authority as to the point now taken, of a *departure* in pleading. In *Read v. Rann* (a), where it was held that a ship broker who had negotiated a bargain for the hire of a vessel,

(a) 6 Bing. 653; 4 M. & P. 532.

(b) 10 B. & Cr. 438.

which afterwards went off, (the usage being that the broker received a certain commission on the freight, if the contract was perfected, but not otherwise), was not entitled to recover against the ship owner for his work and labour, even on a quantum meruit, *Parke, J.*, says, "In some cases a special contract, not executed, may give rise to a claim in the nature of a quantum meruit; e. g., where a special contract has been made for goods, and goods sent, not according to the contract, are retained by the party; there a claim for the value on a quantum valebant may be supported; but then, from the circumstances, *a new contract may be implied.*" If, then, the plaintiff proposes to set up a new contract arising from subsequent circumstances, he should have new assigned.

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Curzon, for the plaintiff.—There is no departure. The plaintiff may either rely on a special contract executed, or go on a quantum valebant. Then, the defendant having by his plea endeavoured to confine the plaintiff's case to a contract made on a Sunday, the replication, which is in the nature of a new assignment, rests the plaintiff's claim upon the contract of quantum valebant. [*Parke, B.*—The real question is, whether the replication is good in substance: whether an action will lie on a contract arising from the detainer of the goods, even with an express promise to pay.] *Williams v. Paul* is an authority that it will: there the plaintiff recovered on a quantum valebat count. Whether the promise were express or implied, it would not be laid in the declaration, but would be matter of evidence. [*Parke, B.*—If you have set out in your replication a good and valid contract, it will be sufficient; but the objection is that it states no promise. At all events, the keeping of the goods is only evidence of a promise. You ought to have stated that the defendant retained the goods, and promised to pay for them. The replication ought not to have stated the facts, but the

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inference of law.] The replication, being in the nature of a new assignment, it is a repetition of the declaration, and it prays judgment for the non-performance of the promise alleged in the declaration.

LORD ABINGER, C. B.—I think the replication is bad.

PARKE, B.—The replication is certainly bad: for, even supposing *Williams v. Paul* to be good law, (and in one point of view, which has not been adverted to, it may perhaps be supported, viz., that though the contract is illegal, being made on a Sunday, the property in the goods passes, although no action can be maintained for them), yet the plaintiff has not brought himself within the decision in that case, which proceeded on the ground that there was an express promise to pay, after the retention of the goods. The replication should therefore have stated an express promise by the defendant, after the retention of the goods on the Monday, and, not having done so, it is clearly bad.

BOLLAND, B., and GURNEY, B., concurred.

Judgment for the defendant.

BRIDGE v. The GRAND JUNCTION RAILWAY COMPANY.

Case for the negligent management of a train of railway carriages, whereby it ran against another train, in one of which the plaintiff was riding, and injured him.

Plea, that the parties having the management of the train in which the plaintiff was, managed it so negligently and improperly, that, in part by their negligence, as well as in part by the defendant's negligence, the defendant's train ran against the other, and caused the injuries to the plaintiff:—*Held*, that the plea was bad in form, as amounting to not guilty; and in substance, for not shewing, not only that the parties under whose management the plaintiff was were guilty of negligence, but also that by ordinary care they could have avoided the consequences of the defendant's negligence.

CASE. The declaration stated, that, before and at the time of the committing of the grievances thereafter mentioned, to wit, on the 9th September, 1837, the plaintiff was a passenger by a certain carriage forming part of a certain train of railway carriages then being on a journey

on and by a certain railway, to wit, the Liverpool and Manchester Railway; and the said company was also then possessed of a certain other train of railway carriages then also journeying on and by the said railway, under the care and management of certain servants of the said company: nevertheless the said company, by their said servants, so carelessly, negligently, and improperly behaved and conducted themselves in and about the management, control, and direction of the said train of the said company, that the same, by and through the default, carelessness, negligence, and improper conduct of the said servants of the said company, then with great force and violence ran upon and against the said train of carriages in one whereof the plaintiff then was being carried as aforesaid, and struck against the same, by means whereof the said last-mentioned train was very much injured, and the said carriage on which the plaintiff then was driven in, broken to pieces, and destroyed, and thereby three of his the plaintiff's ribs were fractured and broken, and he was otherwise greatly wounded, bruised, and injured, &c.

Plea, that, before and at the time of committing the grievances in the declaration alleged, the said train of carriages, in one whereof the plaintiff was a passenger, did not belong to the defendants, nor was the same under the care and management of the defendants or of their servants, but under the care and management of other persons: that, before and at the time when &c. in the declaration mentioned, the said train of railway carriages of the defendants was lawfully proceeding on the said railway, and that the persons who had the management, control, and direction of the said train of carriages in one whereof the plaintiff was then being carried, carelessly, negligently, and improperly behaved and conducted themselves in and about the management, control, and direction of the same, and that, in part by and through the default, carelessness, and negligence, &c., of the last-men-

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tioned persons, as well as in part by and through the default, carelessness, and negligence, &c., by or on the part of the servants of the defendants in and about the management, &c., of the said train of carriages of the defendants, the said train of carriages of the defendants ran upon and against the said train of carriages, in one whereof the plaintiff then was being carried, and struck against the same, and occasioned the damage, injuries, &c., in the declaration mentioned. Verification.

Special demurrer, assigning the following causes:—that the plea amounts to not guilty; that it is argumentative, and the allegations in it are averments of evidence and not of facts; that it consists of matters of law, and not of matters of fact on which any material issue can be taken, &c. In the margin of the demurrer it was stated that the plaintiff would also argue that the plea was bad in substance.

Cowling, in support of the demurrer, was stopped by the Court.

Nevile, contra.—The plea is good both in substance and in form. If there was negligence as well on the part of the plaintiff as of the defendants, they are not answerable in law: *Vennall v. Garner* (a), *Pluckwell v. Wilson* (b), *Luxford v. Large* (c), *Vanderplank v. Miller* (d). The plea, therefore, discloses a substantial defence to the action. But, secondly, it is good also in form, as a plea in confession and avoidance. It confesses a *prima facie* case of negligence in the defendants, but avoids it by introducing new matter, viz., that the persons who had the conduct of the carriage in which the plaintiff was were also guilty of negligence. But, further, although the facts

(a) 1 C. & M. 21.

(b) 5 Car. & P. 375.

(c) Ibid. 421.

(d) Moo. & M. 169.

alleged in the plea might be given in evidence under the plea of not guilty, yet, as they present a question of law for the determination of the Court, it is no objection on special demurrer that the plea amounts to not guilty. The distinction is taken in several cases, that, where *a question of law* is raised on the face of the plea, the party may allege the matter specially, although it might have been given in evidence under the general issue: *Birch v. Wilson* (a), *Chambers v. Taylor* (b), *Pain v. Rochester* (c), *Newton v. Creswick* (d). The matter of law raised here, is, whether the negligence of the parties under whose care the plaintiff was, excuses the defendants' negligence. [Parke, B.—The question is, whether the plea is not altogether bad in substance. It is consistent with all the facts stated in it, that the plaintiff (or they under whose guidance he was) was guilty of negligence, and the defendants also; and yet that the plaintiff is entitled to recover. Can it be said, that, because a carriage is on the wrong side of the road, a party is excused who drives against it? It ought to have been shewn that there was negligence in not avoiding the consequences of the defendants' default. The principle is very clearly stated by Lord Ellenborough and Bayley, J., in *Butterfield v. Forrester* (e). [Lord Abinger, C. B.—The negligence of the plaintiff, in order to preclude him from recovering, must be such as that he could by ordinary care have avoided the consequences of the defendants' negligence.] It is sufficiently averred in the plea, that the collision itself took place by the negligence of both parties.

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LORD ABINGER, C. B.—I think the plea is bad in substance. And, in point of form, it amounts to no more

(a) 2 Mod. 274.

(b) Cro. Eliz. 900.

(c) Cro. Eliz. 871.

(d) 3 Mod. 165.

(e) 11 East, 60.

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than a simple negation of the negligence which makes the defendant liable.

PARKE, B.—The plea undoubtedly amounts to the general issue. But I think it is also bad in substance, on the ground I before stated; that all the facts alleged in it may be true: there may have been negligence in both parties, and yet the plaintiff may be entitled to recover. The rule of law is laid down with perfect correctness in the case of *Butterfield v. Forrester*: and that rule is, that, although there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover: if by ordinary care he might have avoided them, he is the author of his own wrong. That is the only way in which the rule as to the exercise of ordinary care is applicable to questions of this kind. Nothing to that effect is alleged in this plea: and, even if it were, it is equivalent to not guilty.

BOLLAND, B., concurred.

Judgment for the plaintiff (a).

(a) See *Gough v. Bryan*, 2 M. & W. 770.

SUNBOLF v. ALFORD.

An innkeeper cannot detain the person of his guest, or take off his clothes, in order to secure payment of his bill.

TRESPASS for assaulting and beating the plaintiff, shaking and pulling him about, stripping and pulling off his coat, carrying it away, and converting it to his the defendant's own use, &c. Plea, that, before and at the said time when &c., the defendant was and still is an innkeeper, and, as such innkeeper, did then and during all the time aforesaid keep, and still doth keep, a certain common inn

for the reception, lodging, and entertainment of travellers and others; and that, just before the said time when &c., the defendant so being such innkeeper, and so keeping the said inn as aforesaid, to wit, on &c., the plaintiff and divers other persons in company with him, came into and were then received by the defendant as guests in the said inn, and in the way of defendant's said business of an innkeeper, and the defendant then found and provided them at their request with divers quantities of tea and other victuals, and the plaintiff and the said other persons thereupon, and just before and at the said time when &c., became and were indebted unto the defendant in a certain small sum of money, to wit, 11*s.* 3*d.*, for and in respect of the defendant's having so found and provided them with the said tea and victuals; and thereupon the defendant, just before the said time when &c., required and demanded of the plaintiff and the said other persons, payment by them, or some or one of them, of the said sum in which they were so indebted, or some security or pledge for the payment thereof; but the plaintiff and the said other persons wholly refused then or at any other time to pay to the defendant the said sum, or leave with or give to the defendant any security or pledge for the payment of the same; and, before and at the said time when &c., persisted in and would have departed from and left the said inn of the defendant, against his will and consent, without paying the said sum of 11*s.* 3*d.* so due as aforesaid, had not the defendant kept and detained the plaintiff or some other of the said persons, or their goods and chattels, or some of them, until they paid it: and because the plaintiff and the said other persons would go and depart from the said inn without paying, and refused to pay that sum to the defendant, against the defendant's will and consent, and because that sum remained wholly due to him, and because the plaintiff and the said other persons would not and refused to leave with or give any

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pledge or security whatever to the defendant for the payment of that sum, and the defendant could not procure or obtain from them, or any or either of them, any other pledge or security than the said coat in the declaration mentioned, he, the said defendant, at the said time when &c., did gently lay his hands on the plaintiff, to prevent him from going and departing from the said inn without his or the other persons' paying the defendant the said debt of 11s. 3d., or giving the defendant some security or pledge for the payment of it; and the defendant did then, for the purpose of obtaining and acquiring such security or pledge, to a gentle and necessary degree lay his hands on the plaintiff, and strip and pull the said coat in the declaration mentioned from and off the plaintiff, the same being a reasonable security or pledge in that behalf, and then placed the same in the said inn, wherein the defendant hath from thence hitherto kept and detained the same as such security and pledge, the said debt of 11s. 3d. still being wholly due and unpaid to the defendant; and thereupon the defendant suffered and permitted the plaintiff and the said other persons to go and depart from the said inn; and, on the occasions aforesaid, the defendant necessarily and unavoidably to a small degree shook and pulled about the plaintiff, which are the said alleged trespasses, &c.

Special demurrer, on the ground that the matters alleged in the plea furnish no legal justification or excuse for the trespasses charged in the declaration. Joinder in demurrer.

Wordsworth appeared in support of the demurrer, but the Court called on

Humfrey to support the plea.—An innkeeper being bound by law to receive travellers and other guests, he has also necessarily the right to detain their persons or

goods as a security for the payment of his charges. The law annexes such a condition, without the express agreement of the parties; Bac. Abr. Inn, (D); per *Eyres, J.*, in *Newton v. Trigg* (a). It would be unreasonable if it were not so; since the innkeeper is obliged to receive and to furnish provisions to a party of whom he knows nothing, and whom he may never see again in order to enforce the contract. He ought to be clothed with greater power than a party who can refuse to make the contract at all. There is a precedent for a similar plea in 9 *Wentworth's Pleader*, 362; *Ward v. Clarke*; and it does not appear that any objection was made to it (b). Then, as to the detaining the coat, it will be said that the doing so may lead to a breach of the peace; but the same argument would equally apply to a detainer of the person. [*Parke, B.*—Has the innkeeper a right to turn the guest out without a coat? Would he have a right to take off all his clothes, and send him away naked? This plea does not set up a claim to detain the person till payment, but to take the man's coat off his back and turn him out.] Suppose the guest took in with him a valuable parcel, which he kept, though not in his hands, yet near him and under his immediate superintendence—could not the innkeeper detain that? And, if so, would the guest's having his hands upon it make any difference? [*Lord Abinger, C. B.*—Is there any report of *Ward v. Clarke*? *Wentworth's Pleader* is a book of no authority; it is a collection of very vicious precedents.] No report of the case is referred to.

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Wordsworth, contra.—The authority cited from *Newton v. Trigg* is a mere obiter dictum of *Eyres, J.*, not neces-

(a) 1 Shower, 269.

(b) The plaintiff new assigned that the defendant assaulted him on other and different occasions, and it therefore became unne-

cessary to determine the sufficiency of the plea, which probably was pleaded only in order to induce the plaintiff to demur.

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sary to the decision of the question in the case, which was whether an innkeeper could be made a bankrupt. [Lord Abinger, C. B.—It was not only an obiter dictum, but a very wide divaricating dictum.] First, the person of the guest cannot be detained for a debt due from him to the innkeeper. In the *Six Carpenters' case* (a), it is said, that, if one comes into a tavern to drink, and when he has drunk he goes away, and will not pay the taverner, it is no trespass, but the taverner *shall have an action of debt*. If there were any remedy against the person, the decisions in *Jones v. Thurloe* (b), and the other cases as to the *lien* of an innkeeper on the *goods* of the guest, would have been unnecessary. The statute 11 & 12 Will. 3, c. 15, s. 2, which provides, that, “if an innkeeper refuse to make a proper reckoning of pints of ale, he cannot for default of payment detain any *goods* so belonging to the person from whom the reckoning shall be due, *but shall be left to his action*,” shews that the legislature did not contemplate the existence of any right of detainer of the *person*, but only of the *goods*, otherwise the provision would have been extended to deprive him of that right also under similar circumstances. Again, if the person can be detained, and so the party may be imprisoned for a debt of eleven shillings, it will operate virtually to defeat the provisions of the statutes for the prevention of frivolous arrests.

But, secondly, even if the defendant was entitled to detain the *person* of the plaintiff, he was not entitled to strip off his coat. If he were, he might go on to a breach of decency as well as of the peace. Besides, the coat being in the plaintiff's actual use, was privileged from any claim of lien. Things in actual use cannot be distrained for

(a) 8 Co. 146. b., referring to 12 Edw. 4, 9 b.

(b) 8 Mod. 172; S. C. *Jones v.*

Pearle, 1 Stra. 556: and see *Thompson v. Lacy*, 3 B. & Ald. 283.

rent; Co. Litt. 47. a; nor can things of a debtor "pro victu of himself and family," be taken under a fieri facias, or even under an extent; Com. Dig., Debt, (G. 3.) The wearing apparel of a party in bed may be taken in execution, *Bissett v. Caldwell* (a); or while it is being washed, *Baynes v. Smith* (b); but there is no lien on the clothes which the party is actually wearing, *Wolfe v. Summers* (c). And the defendant could acquire no lien on the coat by his wrongful act; *Griffith v. Hyde* (d), *Madden v. Kempster* (e).

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Butt, amicus curiæ, mentioned a recent case in the Queen's Bench, in which he was counsel, (not yet reported), where a similar plea to the present was held bad on demurrer.

LORD ABINGER, C. B.—I should be very sorry to have it thought that I entertain any doubt in this case, or required any authority to support the judgment I propose to give: although, if there were any at variance with it, I should feel bound to look into and consider them. As to the authority cited from the case of *Newton v. Trigg*, it is the dictum of a single judge, unnecessary for the decision of the case, and resting perhaps on the authority of a doubtful reporter, who might not have heard accurately what was said; and I cannot conceive that to be any authority at all on such a subject. And as to the supposed authority of *Wentworth*, it is really no authority whatever. Mr. *Wentworth* was not a reporter; his is a vast collection of pleadings, obtained from Mr. *Lawes* and one or two other gentlemen, which he threw together, and which I have found, in a very long career of professional

(a) Peake's N. P. 36; 1 Esp. 206, note.

(b) 1 Esp. 206.

(c) 2 Campb. 631.

(d) Selw. N. P. 1411, 9th ed.

(e) 1 Campb. 12.

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life, to be in a great measure extremely incorrect; and it cannot be assumed that there is the least authority to be derived from his statement. Let us then look at the case itself. If an innkeeper has a right to detain the person of his guest for the non-payment of his bill, he has a right to detain him until the bill is paid,—which may be for life; so that this defence supposes, that, by the common law, a man who owes a small debt, for which he could not be imprisoned by legal process, may yet be detained by an innkeeper for life. The proposition is monstrous. Again, if he have any right to detain the person, surely he is a judge in his own cause; for, he is then the party to determine whether the amount of his bill is reasonable, and he must detain him till the man brings an action against him for false imprisonment, and then if it were determined that the charge was not reasonable, and it appeared that the party had made an offer of a reasonable sum, the detainer would be unlawful. But, where is the law that says a man shall detain another for his debt without process of law? As to a lien upon the *goods*, there are undoubtedly cases of exception to the general law in favour of particular claims; and, if an innkeeper has the possession of the goods, and his debt is not paid, he has a right to detain them by virtue of that possession: but I do not agree that he has any right to take a parcel or other property out of the possession of the guest. If the guest is robbed of goods while they are in his own hands, the innkeeper is not liable. It appears to me, therefore, being without any authorities on the subject, that the plea is in principle utterly bad, and that there is no ground for the attempt to justify an assault, under the pretence of detaining a man for a debt due to an innkeeper. It is also bad under the pretence of justifying the stripping the plaintiff's coat off his back, and thereby inviting a breach of the peace, and making an assault necessary in order to exercise the right to the lien on the coat. It has been

said justly, that, in the case of a distress, where the taking of goods as a pledge for the debt is allowed, the law is in favour of personal liberty, and where goods are in the actual possession and use of the debtor, they cannot be distrained. A man's clothes cannot be taken off his back in execution of a *fiery facias*. I think, therefore, that, in whatever way this plea is looked at, it is bad.

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PARKE, B.—I agree in opinion with my Lord Chief Baron, that this is a bad plea. There can be no doubt that an innkeeper has by law a lien upon the *goods* of his guest, and that is upon the ground that he is bound to receive him, and must have some means given him by which he may be enabled to work out payment of his debt. In the case of *Thompson v. Lacy (a)*, it was not doubted that the same principle applied to the case of a tavern in London. It is admitted that this plea cannot be supported, unless it is made out to the fullest extent that an innkeeper has a lien also on the *person* of his guest. Now that is a startling proposition, and one that would require a great weight of authority to support it, on the ground of the great inconvenience to which it must necessarily lead; for, as my Lord Chief Baron has pointed out, it would give him a right to imprison a poor guest perpetually. I should therefore certainly not assent to the proposition that an innkeeper has any such right, without some authority for it. Mr. *Humfrey*, it is true, has mentioned some supposed authority—the dictum of a single judge in *Newton v. Trigg*; but that authority has been overruled by the Court of Queen's Bench, in the case referred to by Mr. *Butt*, and I think on good grounds. But there is, at all events, no power to do what this plea justifies—namely, to strip the guest of his clothes; for, if there be, then, if the innkeeper take the coat off his back, and that prove to be an insufficient pledge, he may go on and strip

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him naked; and that would apply either to a male or to a female. That is a consequence so utterly absurd, that it cannot be entertained for a moment. Wearing apparel on a man's person (even if it does not extend to goods in the possession of the person) cannot be taken under a fieri facias or under an extent. For these reasons, it seems to me that this plea is altogether bad, and that the justification entirely fails.

BOLLAND, B.—I am of the same opinion. I have always understood the law to be, that the clothes on the person of a man, and in his possession at the time, are not to be considered as goods to which the right of lien can possibly apply. The consequence of holding otherwise might be to subject parties to disgrace and duress, in order to compel them to pay a trifling debt, which after all was not due, and which the innkeeper had no pretence for demanding.

GURNEY, B., concurred.

Judgment for the plaintiff.

RADFORD and Others v. SMITH.

Declaration in
assumpsit stated,
that the sheriff
had seized

goods of the

plaintiffs under a *fi. fa.*, issued on a judgment upon a warrant of attorney, which was executed by the plaintiffs and R., for the use and benefit of the defendant, and to S., as his trustee, and as a security for monies due from the plaintiffs and R. to the defendant; that the goods continued in the hands of the sheriff; and thereupon it was agreed between the plaintiffs and the defendant, that the plaintiffs should give the defendant two other warrants of attorney, one for the amount due on the judgment, the other for a debt due from R. to the defendant, and that the defendant should procure the goods to be re-delivered to the plaintiffs; that the plaintiffs did accordingly give the defendant the two warrants of attorney, but the defendant did not then or within a reasonable time, procure, nor has he, although a reasonable time has elapsed, procured the goods to be re-delivered to the plaintiffs. Plea, that the warrant of attorney in the declaration mentioned to have been executed by the plaintiffs and R., was not given for the use and benefit of the defendant, or to S. as his trustee:—*Held* bad, on special demurrer, as traversing an immaterial allegation.

Held, also, that the declaration was good on general demurrer, although the warrants of attorney were not set out, and although there was no averment of a request to the defendant to cause the goods to be re-delivered.

mentioned, the sheriff of Middlesex had seized divers goods and chattels of the plaintiffs of great value, to wit, of the value of 200*l.*, under and by virtue of a certain writ of fieri facias theretofore issued out of the Court of Queen's Bench, in a certain suit in that Court, wherein one Charles Stoddart was plaintiff, and they the now plaintiffs and one John Hopkins Radford were defendants, and which said writ of fieri facias issued upon a certain judgment theretofore signed in the said Court of Queen's Bench under and by virtue of a certain warrant of attorney by them, the now plaintiffs, and the said J. H. Radford, theretofore, to wit, on the 20th day of April, 1836, given and executed, whereby the now plaintiffs and the said J. H. Radford authorized the said judgment to be entered up, but which said warrant of attorney was then given and executed for the use and benefit of the now defendant, and to the said Charles Stoddart as trustee for the now defendant, and as a security for monies at the time and on the occasion of such warrant of attorney being given and executed as aforesaid, due and payable from the now plaintiffs and the said J. H. Radford to the now defendant; and which said writ of fieri facias was directed to the sheriff of Middlesex; and the said goods and chattels from thenceforth down to and until and at the time of the making of the promise of the defendant, continued and were in the hands and custody of the said sheriff of Middlesex, under and by virtue of the said writ of fieri facias; and thereupon afterwards, to wit, on the 29th day of April, 1837, it was mutually agreed by and between the plaintiffs and the defendant in manner following, that is to say, that they, the plaintiffs, should give to the defendant two several warrants of attorney, the one for the sum of 64*l.* 17*s.*, being the sum due and recoverable upon the judgment upon and under which the said writ of fieri facias was issued as aforesaid, and the other of such warrants of

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attorney for the sum of 34*l.* 3*s.*, being a sum of money which the said J. H. Radford, the father of the now plaintiffs, was then liable to pay to the defendant, and not a debt, claim, or demand against them the plaintiffs, or any or either of them: and that the defendant should cause and procure the said goods and chattels of them, the plaintiffs, to be re-delivered and given up to them. The declaration then alleged that the two sums of 64*l.* 17*s.* and 34*l.* 3*s.* far exceeded the amount to be levied under the fieri facias; and, after averring mutual promises, stated that, in pursuance of the said agreement, the plaintiffs afterwards, and at and within a reasonable and proper time in that behalf, and before the commencement of this suit, to wit, on &c., did give to him, the defendant, the said two several warrants of attorney in the agreement mentioned and provided for, which he, the defendant, then took, accepted, and received of and from the plaintiffs: yet the defendant, not regarding his said promise, did not nor would, *then or at or within a reasonable and proper time* in that behalf, although such reasonable and proper time elapsed before the commencement of this suit, or at any other time, cause or procure the said goods and chattels of them the plaintiffs, or any of them, or any part thereof, to be delivered or given up to the plaintiffs, by means of which premises the plaintiffs have wholly lost and been deprived of the said goods and chattels, and every of them, and the value thereof, &c.

Second plea—That the warrant of attorney in the declaration mentioned, and therein alleged to have been given and executed by the plaintiffs and the said J. H. Radford, was not given and executed for the use and benefit of the defendant, and to the said C. Stoddart as trustee for the defendant, in manner and form, &c.

Special demurrer, on the ground that the plea put in issue a matter wholly immaterial.

Cowling, in support of the demurrer, was stopped by the Court; *Parke, B.*, observing that it was altogether immaterial on whose account the original warrant of attorney was given, since the two new warrants of attorney given in lieu of it would constitute a good consideration.

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Mansel, *contra*.—The defendant would have a benefit by the giving of the first warrant of attorney to a third party as a trustee for him. [*Parke, B.*—Whether that be so or not, it is only a history of the transaction; and it is unnecessarily stated, because the two fresh warrants of attorney formed a good consideration, whether the former one was held by a trustee for the defendant or not].

There are several objections to the declaration. First, that it does not set out the warrants of attorney. The plaintiff ought to have stated the legal effect of the instruments, so as to shew that the taking of them would be a benefit to the defendant. *Bolton v. Fenn (a)*. [*Parke, B.*—You can only take such objections as would be fatal on general demurrer. If there had been judgment by default, would the declaration have been bad on this ground in arrest of judgment?] Again, the declaration does not state any request made to the defendant to re-deliver the goods. Where the contract is merely to pay money, no request need be alleged; but, where it is to do some other specific act, a request must be shewn, before an action can be founded on the default. In *Bach v. Owen (b)*, where A. and B. had agreed to exchange horses, B. giving A. a sum of money to bind the bargain, it was held, on general demurrer, that a declaration in assumpsit by A. against B., for not delivering his horse, was bad for want of a specific allegation of a demand on B. for it; and that the general statement, that B. did not deliver it, although *often requested so to do*, was not sufficient. [Lord *Abinger*,

(a) 1 Lev. 257; 1 Siderf. 413.

(b) 5 T. R. 409.

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 SMITH. C. B.—There the plaintiff was not entitled to the horse until he offered his own, and demanded the other. Where, by the express terms of the contract, a request must precede delivery, or where that is to be implied from the nature of the contract, a request must be both alleged and proved; but not otherwise.] In that case the contract stated in the declaration was merely to deliver the horse, not to do so on request; yet a special request was held necessary to be shewn.

Cowling.—As to the first objection, that the warrants of attorney are not set out, it was sufficient to state the contract in its actual words; the Court cannot say that it is without meaning. With regard to the other objection, the promise of the defendant is to “cause and procure the goods to be re-delivered,” and he is bound to do it within a reasonable time, and is not entitled to wait until he be requested. It is only in the case of collateral engagements, where the party is to do the act on request, that an allegation of request is necessary. The case of *Bach v. Owen* is imperfectly reported; probably the contract there was to deliver on request: and the dictum of *Buller, J.*, that the statement “although often requested,” was an insufficient allegation of the request, has been overruled (a).

LORD ABINGER, C. B.—The contract in *Bach v. Owen* was most probably to deliver on request. As to the first objection, where a warrant of attorney is stated to have been given, it must mean a warrant of attorney of some value.

PARKE, B.—I have no doubt that, upon the first objection, the declaration is not bad on general demurrer. If you look at the contract, there can be no doubt what the

(a) See *Bowdell v. Parsons*, 10 East, 364.

warrant of attorney is ; for, the contract is, that the plaintiff should give the defendant warrants of attorney for certain specified sums of money, as a consideration for his engagement to cause the goods to be re-delivered. It clearly means to describe a warrant of attorney to enter up judgment. But, suppose that does not necessarily appear, if the warrant of attorney be for a sum of money, it must be for the *payment of* a sum of money, and so constitutes a sufficient consideration. As to the objection to the want of a request, the contract of the defendant is absolutely to re-deliver, and no request was required. The case of *Bach v. Owen* is imperfectly reported ; the contract must have been to deliver on request, otherwise *Buller, J.*, would not have taken the point.

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BOLLAND, B., concurred.

Judgment for the plaintiff.

HALL v. FRANKLIN.

THIS was an action of assumpsit brought by the plaintiff, one of the public officers of the Northern and Central Bank of England, against the defendant, to recover the sum of 606*l.* 10*s.*, the amount of a bill of exchange drawn by the defendant on Messrs. J. and P. Duncan, payable to the order of the defendant four months after date, and by him indorsed to the Northern and Central Bank.

Plea, that the bill of exchange in the declaration mentioned was made by him, the defendant, and indorsed and delivered to the plaintiff, and the promise in the declara-

To an action of assumpsit by the indorsees against the indorser of a bill of exchange, the defendant pleaded that the bill was made and indorsed after the passing of the stat. 57 Geo. 3, c. 99, which restrains spiritual persons from being occupied in any trade or dealing; that the plain-

tiffs were a banking company, of which certain spiritual persons holding benefices were partners and members; that the trade or business of a banker was carried on by the said co-partnership for gains and profits as well of those spiritual persons as others, contrary to the form of the statute; whereby the indorsement and the promise in the declaration mentioned were void in law:—*Held*, on demurrer, that the plea was good, and that the trade of a banker was within the meaning of the statute.

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tion mentioned was made by the defendant, after the passing of the statute intituled "An act to consolidate and amend the laws relating to spiritual persons holding of farms, and for enforcing the residence of spiritual persons on their benefices, and for the support and maintenance of stipendiary curates in England;" and the defendant further saith, that, before and at the several times of the making of the said bill, and indorsing and delivering the same to the said copartnership, and making the promise in the declaration mentioned, and thenceforth continually hitherto, certain spiritual persons, each of whom then and during all and every of the times aforesaid, had and held and still has and holds a certain benefice in England, within the true intent and meaning of the said last-mentioned statute (that is to say), one Richard Basnett and one Rowland Blaney, were and are partners, and each of them was and is a partner concerned and engaged in, and members and a member of, the said copartnership or banking company in the declaration mentioned; and the defendant further says that the trade or business of a banker so carried on by the said copartnership in the declaration mentioned, under the provisions of the statute therein mentioned, before and at the several times of the making of the said bill by the defendant, and of the indorsing and delivering of the same to the said copartnership, and of the making of the said promise in the declaration mentioned, was and from thenceforth hitherto hath been and still is so carried on by the said copartnership, for the gain and profit as well of the said Richard Basnett and Rowland Blaney, so respectively being such spiritual persons as aforesaid, as of the several other persons being members thereof, contrary to the form of the statute in that behalf; and the defendant further saith, that the said indorsement and delivery of the said bill by the defendant to the said copartnership, as in the said declaration mentioned, were and are a contract made by the defendant with the said

copartnership so including and comprehending the said Richard Basnett and the said Rowland Blaney, so respectively being such spiritual persons as aforesaid, in the way of their said trade or business of a banker, for the gain and profit of the said copartnership, so including and comprehending the said Richard Basnett and the said Rowland Blaney, so respectively being such spiritual persons as aforesaid, and for the gain and profit as well of the said Richard Basnett and Rowland Blaney, so respectively being such spiritual persons as aforesaid, as of the several other persons being members thereof, and not otherwise, and were and are made contrary to the form of the statute in such case made and provided; and that the said promise of the defendant in the declaration mentioned, was made by him with the said copartnership, so including and comprehending the said Richard Basnett and the said Rowland Blaney, so respectively being such spiritual persons as aforesaid, in the way of their said trade or business of a banker, for the gain and profit of the said copartnership, so including and comprehending the said Richard Basnett and Rowland Blaney, so respectively being such spiritual persons as aforesaid, and for the gain and profit as well of the said Richard Basnett and Rowland Blaney, so respectively being such spiritual persons as aforesaid, as of the several other persons being members thereof, and not otherwise, and was and is made contrary to the form of the statute in such case made and provided; whereby, and by force of the statute in such case made and provided, the said indorsement of the said bill, and the said promise of the defendant in the declaration mentioned, were and are void in law. Verification.

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Special demurrer, and joinder in demurrer.

The points stated for argument, on the part of the plaintiff, were as follows :—

That the statutory enactment of the 57 Geo. 3, c. 99,

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s. 3, upon which the plea is founded, is not applicable to the case of a clergyman holding a share or shares in a banking company established under the 7th Geo. 4, c. 46, and that the contracts of such banking company in their business of bankers, though a clergyman is a member of it, are not therefore void.

That the business of a banker is not within the 57 Geo. 3, c. 99, s. 3.

That the matters of the plea afford no defence to the action.

That the plea should have stated, with particular certainty, the nature and description of the benefices held by the spiritual persons therein named, and where they are, and what spiritual offices they hold.

That the contract or bargain raised by the indorsement of a bill cannot necessarily be taken as a contract or bargain within the 57 Geo. 3, c. 99, s. 3.

That the plea should have set forth the contract or bargain or circumstances under which the indorsement was made, and for what value or consideration.

That the plea should have shewn the nature of the gain or profit bargained or contracted for to be made by the banking company on the indorsement.

The points of argument on the part of the defendant were :—

That a banking business is a trade, and is repeatedly treated as such in the statute under which the plaintiff sues. That such a trade is within the meaning of the 57 Geo. 3, c. 99. That the co-partnership in the declaration mentioned is carried on in violation of that act. That it is obviously carried on for profit, under the provisions of the act in the declaration mentioned. And the indorsement of a bill constitutes a contract, and is a contract within the meaning of the said 3rd sect. of 57 Geo. 3, c. 99.

That the bill being indorsed to the copartnership in the

way of their trade of a banker, it is to be presumed that it was so indorsed for their gain and profit, but the plea avers that it was indorsed for their gain and profit as bankers.

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That the plea is well pleaded in form as well as substance; that it follows the language of the 3rd section of the 57 Geo. 3, c. 99, and is sufficiently explicit.

The case was argued in Michaelmas Term last by

Sir *W. W. Follett*, in support of the demurrer.—This is a most important question: it is whether the statute 57 Geo. 3, c. 99, makes void all contracts entered into by bankers where any one of the firm is a spiritual person; and whether, if so, the consequence would not also follow that contracts could not be enforced *against* such a firm; and not only against the spiritual person himself, but against all the partners of the firm, and all persons who may deal with them. If the legislature had clearly said so, the Court would no doubt decide accordingly; but they will not so decide upon a strained construction of the act of parliament. It is impossible to say here that the legislature *clearly* meant such a case as the present to come within the act; the inference to be drawn from the language of the act is *necessarily* the other way. There has been no previous decision on this statute; the case, therefore, will turn entirely on the construction to be given to the words of the act of parliament. The 3rd section enacts, "That no spiritual person having or holding any dignity, prebend, canonry, benefice, stipendiary curacy, or lectureship, shall, by himself, or by any other for him or to his use, engage in or carry on any trade or dealing for gain or profit, or deal in any goods, wares, or merchandize, by *buying and selling* for lucre, gain, or profit, in any market, fair, or other place." If the statute had stopped there, it would be clear that the legislature meant only dealing by *buying and selling*; but it goes on to provide a penalty, which penalty extends to all that is

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before prohibited, "upon pain of forfeiting the value of the goods, wares, and merchandizes, by him or by any to his use *bargained and bought to sell again*, contrary to the provisions of this act;" it then goes on—"and that every bargain and contract so made by him, or by any to his use, in any such trade or dealing" (using the same words as before) "contrary to this act shall be utterly void and of none effect; and the one-half of every such forfeiture shall go to his Majesty, and the other half to him that will sue for the same." Now, what is the meaning of that section? It prohibits spiritual persons from buying and selling goods, and imposes a penalty on them for so doing, and that penalty is the value of the goods bought for sale. The penalty can only attach on the goods bought and sold, or purchased for the purpose of sale; and in all penal acts it is held that the penalty and the prohibition are co-extensive. But it may be argued that the act extends to other cases than those of mere buying and selling, by reference to the language of the 4th section; but that in truth restrains the operation of the former section. It enacts,—“That nothing in this act contained in relation to being engaged in trade or dealing, *or* buying or selling, shall extend or be construed to extend to, or to subject to any penalty or forfeiture, any spiritual person for keeping a school or seminary, or acting as a schoolmaster or tutor or instructor, or being in any manner concerned or engaged in giving instruction or education for profit or reward, or for buying or selling, or doing any other act, matter or thing, in the conduct of or carrying on, or in relation to the management of any such school, seminary or employment; or to any spiritual person whatever, for the buying of any goods, wares, or merchandizes, or articles or things of any description, which shall without fraud or covin be bought to the intent and purpose, at the buying thereof, to be used and employed by the spiritual person buying the same, for his family or

in his household, and after the buying of any such goods, wares, or merchandizes, or articles or things, the selling the same again, or any parts thereof, which such person may not want or choose to keep, although the same shall be sold at an advanced price beyond that which may have been given for the same; or for any buying or selling again for any lucre, gain, or profit, of any manner of cattle or corn, or other matters or things whatever, necessary, proper, or convenient to be bought, sold, kept, or maintained by any spiritual person, or any other person for him, or to his use, for the occupation, manuring, improving, pasturage, or profit of any glebe, demesne, farms, lands, tenements, or hereditaments, which may be lawfully held and occupied, possessed or enjoyed, by such spiritual person, or any other for him or to his use: provided always, that nothing herein contained shall extend or be construed to extend to authorize any such spiritual person to sell any cattle or corn, or other matters or things as aforesaid, in person, in any market, fair, or place of public sale." It cannot be contended that the mere act of giving instruction would be within the meaning of the preceding section, or that the mere profession of a school-master was intended to be excepted: the intention was to protect the buying and selling which was incident to such an occupation; and to prevent such a buying and selling as constituted a trading within the bankrupt laws. Again, the words of the 4th section are, that nothing in this act contained in relation to being engaged in trade or dealing, or buying or selling, shall "*subject to any penalty or forfeiture any spiritual person,*" &c. By the former section, a penalty or forfeiture is only to attach on the goods bought to sell again. [Alderson, B.—The preamble of the act speaks of consolidating into one act the laws relating to spiritual persons holding of farms, and to buying and selling, and for enforcing of residence and maintenance of stipendiary curates.]—The 4th section also excepts

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from the operation of the act the selling again, though at an advanced price, any goods which such spiritual person may not want or choose to keep. These two sections, and the preamble, clearly shew that the statute meant the prohibition to extend to *buying and selling* only. But, look at the inconvenience which a contrary determination would cause! This is a bill of exchange which came in the course of negotiation into the hands of this banking company. If the indorsement to the company is a contract within the meaning of the 3rd section, it would be rendered utterly void. Then, what would be the consequence of their indorsing the bill over to a third party for a valuable consideration? Would the defendant be liable to such subsequent indorsee? The defendant might still deny his liability, from the fact of the bill having passed through the hands of the company. This is a highly penal act, and the Court will not strain it beyond the clear words. [*Alderson, B.*—Is this more than a consolidation of the old statutes, 21 Hen. 8, c. 13, and the other acts?]

Maule, contrâ.—This statute has been said to be a consolidation of the old acts. [*Alderson, B.*—The preamble recites it to be so.] If the statute 21 Hen. 8, cap. 13, is looked to, it will be found that this new statute is not a mere consolidation of it; for, the provisions of the old statute are very different, and the later act is not a mere adoption of them. The 5th section of the 21 Hen. 8, c. 13, enacts, “that *no* spiritual person or persons, *secular* or *regular*, of what estate or degree soever they be, shall from henceforth, by himself, nor by any other for him nor to his use, bargain and buy to sell again for any lucre, gain, or profit, in any markets, fairs, or other places, any manner of cattle, corn, lead, tin, hides, leather, tallow, fish, wool, wood, or any manner of victual or merchandize, what kind soever they be of, upon pain to forfeit treble

the value of every thing by them or by any to their use bargained and bought to sell again, contrary to this present act; and that every such bargain and contract, hereafter to be made by them or by any to their use, contrary to this act, shall be utterly void and of none effect." The provisions of the two acts are very different. By the 1st section of the former statute, *every* spiritual person, secular or regular, is prohibited from one kind of trading; namely, taking lands to farm. At the time when the act 57 Geo. 3, c. 99, passed, trade was very differently circumstanced to what it was when the former act passed. It was not confined to dealing in cattle, corn, lead, tin, &c. but extended to transactions in bills of exchange, securities, stocks, and many others than those enumerated in the former statute. The act of Geo. 3 is more restricted in one sense; it is not that *no* spiritual person, but that *no beneficed* person, shall be engaged in any trade or dealing. But it is also more extensive in its operation; the prohibition to carry on *trade* generally is not in the statute of Henry 8.; it is introduced for the first time into the later statute, and the legislature have there studiously introduced words large enough to comprehend every kind of trading or dealing; the words are, "shall not engage in or carry on any *trade* or *dealing*." The act is not to be dealt with as a penal act; the defendant is not seeking here to enforce a penalty. The act is a highly remedial one, intended to improve the morals of the people, and full effect ought to be given to it. The construction now contended for is in accordance with the literal reading of the words, "shall not engage in or carry on any trade or dealing," which is a direct prohibition; and if the act prohibits the trading, the contract would be void at common law, and the spiritual person engaged in it could bring no action. But, in addition, there is here an express provision that the contract shall be void. [*Alderson*, B.—The words are, "every contract *so* made by him in any *such* trade or dealing" shall be void. The word *such* would be use-

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less unless it was intended to have reference to what had gone before.] *Every* contract, means every such contract, and means to include every contract included in both the statutes. The term contract, *eo nomine*, had not been mentioned before in the 57 Geo. 3, but it was in the old statute. Relative terms were not used in very old law. The words, "such," or "so," are to be taken to refer to the sense or substance of that which has gone before, and not to the precise expression. According to the construction contended for on the other side, a dean or archdeacon, or other beneficed person, might become a member of and engaged in the dealings of the Stock Exchange, or a member of Lloyd's, and contract for policies of insurance, or might be of any trade which does not include the buying to sell again. Of all trades, these would be the most improper for a spiritual person to be allowed to be engaged in. [*Parke, B.*—Would it make any difference whether this were a joint stock bank, or a bank with only two or three persons engaged in it? What would be the consequence of a spiritual person being made executor to a member of a regular trading partnership?] His acting as executor would not be a trading or dealing within the meaning of the act. [*Parke, B.*—It would, if he continued to carry on the trade as executor.] Undoubtedly: but if, without having the animus or intention of carrying on the trade, the spiritual person did not concern himself in the business any more than was necessary in his character of executor, in order to realize the assets, he would not be within the statute. The words in the 4th section, that nothing in this act contained in relation to being engaged in "trade or dealing," or "buying or selling," shew that two different things are intended, and that a trading otherwise than by buying and selling was contemplated by the act. The words of the statute are sufficient to prohibit any kind of trade or dealing for gain or profit, and in its very terms it includes this case.

Sir *W. W. Follett*, in reply.—The decision of this case must turn on the construction of the words of the act; and the object and intention of the legislature is to be collected from the language of it. The preamble states the object of the act to be to explain the provisions of the former acts, and to make other provisions, and “that the several laws relating to spiritual persons holding of farms, and to *buying and selling*, and for enforcing of residence and the maintenance of stipendiary curates, shall be *consolidated* in one act.” That being the object of the act, let us look to its provisions. It says, “that every bargain and contract *so* made by him,” shall be void;—which refers to the words in the former part of the section, i. e. to contracts for buying goods to sell again. No contract would be made void, except a contract for buying or selling. The object of the enactment was to prevent the property in any goods passing to any clergyman, where they were bought to sell again. It has been said that the late act was rather restricted, as it applies only to beneficed clergy; but the object of the legislature was to embrace all persons really exercising the duties of clergymen. The objects of both acts are the same in this respect. The word contract, in the statute of Henry the 8th, clearly means a contract by buying and selling. But those in the 57 Geo. 3 are more precise,—that no spiritual person shall “engage in any trade or dealing for gain or profit, or deal in any goods, wares, or merchandizes, by *buying and selling* for lucre, gain, or profit, in any fair, market, or other place.” The words “buying and selling,” override the whole. [*Alderson*, B.—According to that, the words “fair or market,” would override the whole. *Parke*, B.—And according to that construction, there would be a repetition of the words “gain or profit.”] Then comes the clause as to making void the contract, “and that every bargain *so* made by him, &c., in any *such* trade or dealing, contrary

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to this act, shall be utterly void and of none effect; and the one-half of *every such* forfeiture shall go to his Majesty, and the other half to him that will sue for the same." So that the contract is to be null and void in cases where there is a forfeiture of the goods. Whether the statute is penal or remedial, the Court will never come to such a conclusion as they are asked to do in this case, unless the legislature has clearly expressed an intention that the prohibition should be so extensive. If the words, "trading or dealing," are to be taken to mean every possible mode of trading, then the words "by buying or selling" would be totally useless.

Cur. adv. vult.

The judgment of the Court was now delivered by

Lord ABINGER, C. B.—This is an action brought against the defendant as drawer and indorser of a bill of exchange, by George Hall, as one of the public officers of certain persons united in copartnership for the purpose of carrying on business as bankers in Manchester and elsewhere, by the name and description of the Northern and Central Bank of England, under and by virtue and according to the form and effect of the statute 7 Geo. 4, "for the better regulating copartnerships of certain bankers in England."

The defendant pleads, that the bill of exchange was made and indorsed and delivered to the plaintiff, and the promise in the declaration mentioned was made by the defendant, after the passing of the statute intituled "An act to consolidate and amend the laws relating to spiritual persons holding of farms, and for enforcing the residence of spiritual persons on their benefices, and for the support and maintenance of stipendiary curates in England;" that two persons of the names of Richard Basnett and Rowland Blaney were spiritual persons, and were partners

concerned in the carrying on of the said copartnership or banking company; that the said trade is carried on as well for the gain and profit of the said two spiritual persons as of the several other persons concerned; that the indorsement and delivery of the bill by the defendant to the said copartnership were and are a contract made by the defendant with the said copartnership, so including and comprehending these two spiritual persons, in the way of their trade or business of a banker, as well for their gain and profit as for the gain and profit of the several other persons members thereof,—and the same with respect to the promise,—contrary to the form of the statute.

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To this plea the plaintiff has demurred. There are grounds of special demurrer suggested; but, as our attention has not been called to these in argument, and as the Court is not altogether agreed upon the objections so raised, we are not prepared to give any judgment upon them until further argument: but, as we have been pressed several times for our opinion upon the point which has been argued, and which is said to be of great and immediate importance, and as we entertain no doubt on that point, we think it right not further to postpone our judgment upon that which is the principal ground of the demurrer, namely, that the trade or business of a banker is within the intent and meaning of this statute.

The question arises upon the construction to be given to the statute 57 Geo. 3, c. 39, s. 3, which enacts that no spiritual person shall by himself, or by any other for himself or to his use, engage in or carry on any trade or dealing for gain or profit, or deal in any goods, wares, or merchandizes, by buying and selling for lucre, gain, or profit, in any market, fair, or other place, upon pain of forfeiting the value of such goods, wares, and merchandizes, by him or by any to his use bargained and bought to sell again contrary to the provisions of this act: and

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that every bargain and contract so made by him or by any to his use, in any such trade or dealing contrary to this act, shall be utterly void and of none effect.

The defendant contends, that the contract is made void by the act of Parliament, inasmuch as spiritual persons are forbidden to trade, and the act has made void all bargains and contracts made by them in any such trade or dealing; that, whether the copartnership consists of many or few members, makes no difference; that these two spiritual persons are equally interested with the others; and that, if this action can be maintained, so it might even if these two spiritual persons were the only partners in the concern.

And this was hardly contested by the counsel for the plaintiff. But he contended that banking is not a trade or business in the contemplation of the act of Parliament; that the statute of 57 Geo. 3 was intended to consolidate the laws respecting spiritual persons, not to enlarge them; and that this 3rd section was intended to re-enact the 5th and 6th sections of the statute of 21 Hen. 8, c. 13, "That no spiritual person or persons, secular or regular, of what estate or degree soever they be, shall from henceforth by himself, nor by any other for him nor to his use, bargain and buy to sell again for any lucre, gain, or profit, in any markets, fairs, or other places, any manner of cattle, corn, lead, tin, hides, leather, tallow, fish, wool, wood, or any manner of victual or merchandize, what kind soever they be of, upon pain to forfeit treble the value of every thing by them, or by any to their use, bargained and bought to sell again contrary to this present act; and that every such bargain and contract hereafter to be made by them, or by any to their use, contrary to this act, shall be utterly void."

The first observation to be made upon this argument is, that the statute professes to do more than consolidate the former laws; it is an act to consolidate and to amend.

The second is, that the preamble recites that doubts *Each. of Pleas,* have arisen upon the construction of some of the said statutes, and it is therefore necessary that such provisions of the said acts should be explained, *1838.* *and other provisions made,* and that the several laws relating to spiritual persons holding of farms, and to buying and selling, and for enforcing the residence and the maintenance of stipendiary curates, should be consolidated.

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The third section enacts, that no spiritual person shall by himself, or by any other for himself, or to his use, engage in or carry on any trade or dealing, for gain or profit. These words are as general as can be employed,—“any trade or dealing for gain or profit.” It then proceeds to copy the words in the statute of Henry the 8th. It appears to us, upon consideration, not to be a reasonable construction of this act, to reject these general and comprehensive words which are placed in the fore-ground of the enactment. They are not to be found in the 21st of Hen. 8; they are now introduced, and for the first time. They constitute a clear and distinct enactment; they appear to have been introduced to further the intentions of the act; and we do not feel ourselves at liberty to reject a plain unequivocal enactment, and to suppose that it was introduced there without meaning or intention. If the legislature had intended that nothing should be forbidden that was not forbidden by the statute of Henry the 8th, the obvious course was to employ the words of that statute and no other, and not to prefix to them the enactment in question. The statute of Henry the 8th was framed with especial view to the sort of trade then usually carried on: and the legislature may be well understood to contemplate the variety of modes in which trade is now carried on, and to direct its prohibition against trade and business carried on by spiritual persons, whatever shape it may assume. Can it be supposed, that, in its anxiety to rescue spiritual persons from the suspicion of those worldly cares

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and habits which trade and dealing for gain and profit are supposed to generate, it would have exposed them to the possibility of becoming bankers or exchange brokers? It has been argued on the part of the plaintiff, that the intention of the legislature was to forbid that sort of trade or dealing only which consists of buying and selling, because the penalty must be taken to be co-extensive with the offence, and there is no penalty except the forfeiture of the goods bought. But there is nothing inconsistent or unusual in an act attaching a penalty of the forfeiture of goods where there are goods to be forfeited, and where there are no goods to be forfeited, simply avoiding the contract. All usurious contracts are avoided by statute; but there is no penalty except upon the actual taking of unlawful interest. But a comparison of the statute of 57 Geo. 3, with that of Henry the 8th, affords a strong inference against the argument. The words in which contracts are made void, appear to refer more especially to that early part of the section which forbids spiritual persons to trade. The words taken from the statute of Henry the 8th may be considered as a parenthesis; excluding which, the clause will run thus:—That no spiritual person shall by himself, or by any other for himself, or for his use, engage in, or carry on any trade or dealing, for gain or profit. And that every bargain and contract so made by him, or by any for his use, in any such trade or dealing, contrary to this act, shall be utterly void and of none effect.

The words in the latter part of the section, *such trade or dealing*, appear to refer to the words *trade or dealing*, in the early part of the section. In that part of the section which is copied from the statute of Henry the 8th, although the word *deal* is to be found, the word *trade* is not. The part of the clause which is copied from the statute of Henry the 8th, except for the purpose of forfeiting the things bought and sold, and bought with in-

tent to sell, might have been omitted altogether. We have been strongly pressed with the inconveniences that may result from this construction of the statute. We are not insensible to them; but the only proper effect of that argument is, to make the Court cautious in forming its judgment. We cannot, on that account, put a forced construction on the act of Parliament (a).

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Judgment for the defendant.

(a) This decision occasioned the passing of the statute 1 Vict. c. 10: which, after reciting that "divers associations and co-partnerships, consisting of more than six members or shareholders, have from time to time been formed for the purpose of being engaged in and carrying on the business of banking, and divers other trades and dealings, for gain and profit, and have accordingly for some time past and now are engaged in carrying on the same by means of boards of directors or managers, committees, or other officers, acting on the behalf of all the members or shareholders of, or persons otherwise interested in such associations or co-partnerships:" And also reciting that "divers spiritual persons, having or holding dignities, prebends, canonries, benefices, stipendiary curacies, or lecturcs hips, have been and are members or shareholders of, or otherwise interested in, divers of such associations and co-partnerships, and it has not been commonly known or understood that the holding of such shares or interests by such spiritual persons was contrary to

law:" and also reciting, that "it is expedient to render legal and valid all contracts entered into by such associations or co-partnerships, or which for a limited time may be entered into by them, although the same may now be void by reason of such spiritual persons being or having been such members or shareholders, or otherwise interested as aforesaid;" enacts, "that no such association or corporation already formed, or which may be formed at any time before the end of the next Session of Parliament, nor any contract either as between the members, partners, or shareholders comprising such association or co-partnership, for the purposes thereof, or as between such association or co-partnership and other persons, *heretofore* entered into, or which *before the end of the next Session of Parliament* shall be entered into by any such association or co-partnership already formed, or hereafter to be formed, shall be deemed or taken to be illegal or void, or to occasion any forfeiture whatsoever, by reason of any such spiritual persons as aforesaid be-

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EVANS *v.* BARNARD.

Where, in a country cause, issue is joined before or in a non-issuable term, and no notice of trial is given, and the plaintiff does not try at the next assizes, the defendant may move for judgment as in case of a non-nonsuit in the term next after the assizes.

But where issue is joined in a term next preceding the assizes, the motion cannot be made until after two assizes have elapsed.

ADDISON moved for judgment as in case of a nonsuit. It was a country cause: issue was joined on the 14th April, 1837; no notice of trial had been given. The question was, whether the motion was too early.—It was certainly decided, in *Smith v. Miller (a)*, that, in all cases, two assizes must intervene before the defendant could apply for judgment as in case of a nonsuit in a country cause: but that case went further than any former authority. The right to judgment as in case of a nonsuit arose

ing or having been a member, partner, shareholder, manager, or director of or otherwise interested in the same; but all such associations and co-partnerships shall have the same validity, and all such contracts shall and may be enforced in the same manner to all intents and purposes, as if no spiritual person had been or was a member, partner, shareholder, manager, or director of or interested in such association or co-partnership."

The second section provides, "that, in all actions and suits brought by any such association or co-partnership, in case any defendant therein shall, before the 6th February, 1838, by *plea* or otherwise, have insisted on the invalidity of any contract thereby sought to be enforced, by reason of any such spiritual person as aforesaid being or having been a member or shareholder in such

association or co-partnership, such defendant shall be entitled to the full costs of such plea or other defence, to be paid by the plaintiff, and to be taxed as the Court in which the said action or suit shall be depending, or any Judge thereof, shall direct; and, in order to fully indemnify such defendant, it shall be lawful for such Court or Judge to order the plaintiff to pay to him such further costs (if any) of the said action or suit, as the justice of the case may require."

The third and last section merely provides that the act may be repealed or altered by any other act during the present session.

The Reporters have thought it desirable to state the act of Parliament thus fully, on account of the great public importance of it as regards the decision in this case.

(a) *Ante*, 60.

out of the stat. 14 Geo. 2, c. 17, s. 1, which empowers the defendant, when issue is joined, and the plaintiff neglects to bring it to trial *according to the course and practice of the Court*, to apply for such judgment *at any time after such neglect*. The question then is, ought the plaintiff, according to the practice of the Court, to have gone to trial at the Summer Assizes? Mr. Tidd says (a):—"In the Exchequer, it is said, a defendant may give a rule for the plaintiff to enter his issue the same term in which it is joined, whether notice of trial has been given or not." And again (b):—"The plaintiff is not bound to give notice of trial till the term succeeding that in which issue was joined; and if he do not, the defendant cannot move for judgment as in case of a nonsuit, till after the following Assizes." The plaintiff might therefore, under the old practice, have been ruled to enter the issue in Easter Term, and would have been bound to go to trial at the Summer Assizes, and judgment as in case of a nonsuit might have been moved for in Michaelmas Term. *Crowley v. Dean* (c), *Williams v. Edwards* (d), and *Robinson v. Taylor* (e), are authorities in accordance with this view of the case, and were not so strong as the present.

A rule having been granted,

Busby shewed cause.—The judgment in *Smith v. Miller* certainly goes the length of deciding this case against the defendant. The stat. 14 Geo. 2 refers to the *then existing* practice of the Court. Now, until the recent rules, it was always necessary for the defendant to rule the plaintiff to enter the issue: it is not easy, therefore, to ascertain what the words "course and practice of the Court" precisely mean, because, as to this matter, they depended on the option of the defendant. [*Parke, B.*—

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(a) Tidd's Pr. 727.

(b) P. 764.

(c) 1 C. & J. 18.

(d) 1 C. M. & R. 583.

(e) 5 Dowl. P. C. 518.

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At all events, it has been decided that the new rules make no difference as to the time of moving for judgment as in case of a nonsuit. It may be presumed that the defendant would have proceeded as speedily as he could.]

Addison, contra.—All the authorities except *Smith v. Miller* are the other way. There, however, the issue was joined *in*, here *before*, Easter Term.

LORD ABINGER, C. B.—We decided *Smith v. Miller* on the information of one of the Masters, which certainly went too far. It must be taken that when it was said that two assizes must elapse before the motion, that applied to the case where issue was joined in the term next before the first assizes; then that rule will apply.

PARKE, B.—If issue is joined in the term next before the assizes, the defendant cannot move until after two assizes have elapsed. The old rule was, that the plaintiff must take a step in a term. Here, he might have entered the issue in Easter Term, given notice of trial in Trinity Term, and gone to trial at the Summer Assizes. If he did not, the defendant might move for judgment as in case of a nonsuit in Michaelmas Term (a).

ALDERSON and GURNEY, Bs., concurred.

Rule discharged on a peremptory undertaking.

(a) The same motion was made in the present case in Michaelmas Term, on the day on which *Smith v. Miller* was decided, and refused, the Court saying that it must follow the decision in that case.

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JAMES moved for judgment against the casual ejector. There were four tenants, lessees of four adjoining houses, Nos. 1 to 4 in a row; three of them had been served personally, but it appeared that the fourth had left the premises, and it was not known what had become of him. The declaration had been affixed on the door of the house. The Court thought, that, as to this party, the landlord should have proceeded as upon a vacant possession; but *Doe d. Osbaldiston v. Roe* (a) being referred to, a rule nisi was granted, to be served in the same manner as the declaration; and the Court desired that the case should be mentioned again before it was made absolute.

Where there were four tenants, lessees of four adjoining houses, three of whom were personally served with a declaration in ejectment, but the fourth having left the premises unoccupied, the declaration was affixed to the door of his house—the Court granted a rule nisi for judgment against the casual ejector, to be served in the same way as the declaration, and afterwards made the rule absolute on an affidavit of such service.

On a subsequent day, the matter was accordingly mentioned again, and on an affidavit of service in the manner before mentioned, the rule was made absolute as to all the tenants, on the authority of the above case.

Rule absolute.

(a) 1 Dowl. P. C. 456. But see *Doe d. Lord Darlington v. Cock*, 4 B. & C. 259; *Doe d. Showell v. Roe*, 2 C. M. & R. 42; *Doe d. Norman v. Roe*, 2 Dowl. P. C. 399, 428; *Doe d. Roupel v. Roe*, 1 Harr. & Woll. 367.

HARDING *v.* AMBLER.

ASSUMPSIT to recover the balance of certain interest claimed to be due to the plaintiff on the sale by him to the

To assumpsit for the recovery of certain interest due to the

plaintiff on the sale by him to the defendant of a policy of insurance on life, the defendant pleaded, that by indenture made between the plaintiff and defendant, the plaintiff released, exonerated, and discharged the defendant of and from all claim and demand whatsoever for, upon, or in respect of the purchase of the policy, and all monies due to the plaintiff in respect thereof, and of and from the supposed cause of action in the declaration mentioned. It appeared in evidence that the policy was sold subject to a condition that the purchaser should pay down a deposit of 20l. per cent., and sign an agreement for payment of the remainder on the 8th June, 1835; but, should the completion of the purchase be delayed, the purchaser was to pay interest on the balance of the purchase money, at 5l. per cent. per annum, from that day until the purchase was completed. The defendant did not complete the purchase till Jan. 1836, when he paid the purchase money in full, with interest from the 8th June, and an assignment of the policy, duly executed by the plaintiff, containing a release in the terms stated in the plea, and having a receipt for the whole purchase money indorsed, was handed to the defendant. It was afterwards discovered that the plaintiff's attorney, on that occasion, under-calculated the interest by 34l. :—*Held*, that the release was a bar to an action for that sum.

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defendant of a policy of insurance effected with the Equitable Assurance Company, in the name of the plaintiff. There was also a count on an account stated.

Pleas, first, non-assumpsit; secondly, payment; thirdly, that, after the purchase of the said policy of assurance, and before the commencement of this suit, to wit, on the 14th January, 1836, by indenture then made between the plaintiff of the one part, and the defendant of the other part, &c., the plaintiff acquitted, released, exonerated, and discharged the defendant of and from all claim and demand whatsoever, for, upon, or in respect of the said purchase of the said policy, and all monies due and claimable by him for, upon, or in respect thereof, and of and from the said supposed cause of action in the first count mentioned. The plaintiff, by his replications, joined issue on the first and second pleas, and, in answer to the third, denied that the indenture therein mentioned was his deed. The particulars of demand delivered to the defendant were as follows:—"This action is brought to recover the sum of 34*l.*, for the balance due to the plaintiff from the defendant on the sale of the policy mentioned in the declaration."

On the trial before Lord *Abinger*, C. B., at the London sittings after Trinity Term, the following facts appeared. In April, 1835, the plaintiff, who resided in Yorkshire, gave directions to his attorney in London to sell by auction a policy of insurance which the plaintiff had effected on his life in the Equitable Assurance Office. The policy was accordingly put up for sale on the 8th May, 1835, together with other property, under the following amongst other conditions:—"The highest bidder to be the purchaser. The purchasers to pay down immediately a deposit of 20*l.* per cent. in part of the purchase-money, and to sign agreements for payment of the remainder on or before the 8th day of June, 1835; but, should the completion of the purchases be delayed from any cause whatever, the purchasers are to pay interest on the balance of their

purchase-money, at 5*l.* per cent. per annum, from that time until the purchases are completed." The defendant became the purchaser of the policy at the sum of 2290*l.*, and paid down the sum of 458*l.*, by way of deposit, and signed a memorandum of agreement for the payment of the remainder of the purchase-money, pursuant to the conditions of sale. The purchase was not completed until the 22nd January, 1836, on which day the plaintiff's attorney met the defendant and his attorney for the purpose, and the remainder of the purchase-money was paid, together with interest at 5*l.* per cent., as calculated by the plaintiff's attorney, from the 8th June, 1835, to the 14th January, 1836; and a receipt was given by him for the money so received. At the same time, an indenture of assignment by the plaintiff to the defendant of the policy, dated the 14th January, having the plaintiff's receipt for the whole purchase-money (2290*l.*), indorsed, was handed over to the defendant's attorney. In the month of November following, the plaintiff, having discovered that his attorney had miscalculated the interest by the sum of 31*l.*, applied to the defendant for payment of that sum, and in consequence of his refusal to pay it, the present action was brought. It was contended for the defendant, that the plaintiff was estopped by the execution of the indenture, containing the release set out in the plea, from recovering in the action. The Lord Chief Baron reserved the point, and a verdict was taken for the plaintiff, leave being given to the defendant to move to enter a nonsuit.

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Erle having obtained a rule nisi accordingly,

Kelly now shewed cause.—The release did not operate to deprive the plaintiff of his right of action. This claim for *interest* arises on an agreement collateral to that upon which the policy was purchased and the principal money was payable. By the conditions of sale, interest was to

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be paid from a given day, in the event of the purchase not being then completed. The agreement to assign the policy at a certain price is one agreement; the agreement to pay interest in a certain event is another and a collateral one. The release is "from the purchase-money and every part thereof"—that cannot apply to the contingent claim of interest. If the purchase had been completed on the 8th of June, no interest would have been claimable; and the release would clearly have applied to a discharge from the principal money only. It cannot have a different construction now. [*Parke, B.*—The question is, whether the interest is not a part of the purchase-money]. The intention of the parties must be looked to; and it could not be intended to release this collateral demand. The case resembles those in which it has been held that interest on bills of exchange is distinct from and not incidental to the principal sum, and that a discharge from the principal is not necessarily a discharge from the interest also. *Lumley v. Hudson* (a). Indeed, this sum is more in the nature of compensation money for the delay in performing the agreement, than of interest properly so called.

Erle, contra.—The consideration for the assignment of this policy clearly was the supposed receipt of the whole amount of principal and interest; and from that whole sum the plaintiff has released the defendant. If the defendant had sued the plaintiff, at any time after the 8th June, 1835, for not completing the contract, he must have alleged, in compliance with the condition of sale, that he was ready to pay the interest from that day, as well as the principal. The purchaser, by the condition, is to sign one memorandum of agreement only, having reference both to the principal money, and also to the interest, if the principal be not paid by a given day. The deed must be taken most strongly against the conveying party; and

(a) 4 Bing. N. C. 15.

if, as is contended on the other side, the intention of the parties is to be looked to, then it is clear that it was intended, and so understood by the attornies of both parties, that a full and final discharge should be given of all claims in respect of the transfer of the policy. If, therefore, the words of the deed, on a fair interpretation, convey to the defendant a full discharge, the plaintiff, who used them, is estopped from saying that they did not.

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LORD ABINGER, C. B.—I am of opinion that the rule must be made absolute. The release, in words, applies only to the principal money, 2290*l.*; and the question is, whether, after the plaintiff has stated that to be the purchase money, and executed a deed releasing it, he can be let in to prove that it was more. The conditions of sale stipulate that the purchase money is to be paid on or before the 8th of June, 1835; if it is not, the purchaser is to pay interest upon it at a certain rate from that day. If the stipulation had been merely that the party should pay the principal money on the 8th of June, nothing being said about interest, and when that day arrived, the money not being paid, an agreement had been then come to, that for that default interest should be paid, Mr. *Kelly's* argument would have been correct; that would have been a collateral agreement: but this is a contract in which interest is as much included as principal.

PARKE, B.—I am also of opinion that the plaintiff, having executed this deed, is estopped from the receipt of any further consideration-money. The sum accruing by reason of the non-completion of the contract on the day limited, is an additional price; and the plaintiff has released the consideration-money, whatever it was, to the full amount, and cannot now say that more was due.

BOLLAND, B., and GURNEY, B., concurred.

Rule absolute.

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HODGSON v. DOWELL.

A defendant does not waive a defect in the affidavit to hold to bail, by applying for particulars, or demanding a declaration.

An affidavit in order to obtain a Judge's order to arrest a defendant in an action on the case, was made by the plaintiff's attorney, and stated that the defendant was tenant to the plaintiff of a shop and premises of the value of 80*l.* per annum; that the defendant had commenced, on a day stated, (13 days before), and since continued pulling down and destroying the upper part of the premises, and had already committed waste to the amount, *as the deponent was informed and believed, of 63*l.* 11*s.** Held, sufficient.

ON a former day in this term (January 13), *Hurlstone* had obtained a rule to shew cause why the order of *Gurney*, B., for arresting the defendant in this action, (an action on the case in the nature of waste), should not be rescinded, and why the defendant should not be discharged on entering a common appearance, on the ground of the insufficiency of the affidavit upon which the order was made. The affidavit was made by the plaintiff's attorney, and stated that the defendant was tenant to the plaintiff of a shop and other premises, of the value of 80*l.* per annum, and that, on the 25th November, the defendant commenced and had since continued pulling down and destroying the upper part of the front and back of the premises, and had already committed waste to the amount, *as the deponent was informed and believed, of 63*l.* 11*s.** The objection made to the affidavit was, that the amount of damage done ought to have been positively deposed to. The learned Judge, on the 8th December, granted an order for arresting the defendant for 50*l.*, and he was arrested on the 12th. It appeared from the affidavit in opposition to the rule, that the defendant had since applied for particulars of the damage complained of, and had demanded a declaration.

J. L. Adolphus shewed cause.—In the first place, the defendant, by taking a step in the cause since he knew of the alleged irregularity in the affidavit, has waived it. The rule of H. T. 2 Will. 4, (s. 33), provides that “no application to set aside *process or proceedings* for irregularity shall be allowed, unless made within a reasonable time, nor if the party applying has taken a fresh step after knowledge of the irregularity.” [*Alderson*, B.—Does the rule apply to a case like this? Here, the subse-

quent proceedings taken by the defendant are all collateral to the question arising on this motion. The defendant does not seek to set aside any proceedings, but only that he shall try the question in the cause out of prison instead of in prison. Demanding a declaration can hardly be said to be taking a step. Wherever the setting aside proceedings would set aside a step which the party has himself taken, it is reasonable that that should preclude him. *Parke, B.*—The demand of a declaration is only for the purpose of quickening the plaintiff's proceedings, which must go on whether the defendant is in custody, or merely enters a common appearance. Have you any authority that that is a waiver? In *Powell v. Fisher (a)*, the taking a step is explained to mean doing anything to recognize previous proceedings as valid.

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But secondly, the affidavit is sufficient. If a party is to be held to bail for unliquidated damages at all, how is it possible to swear to the *extent* of the damage but by inference and belief? The *nature* of the damage is positively stated. Where, from the nature of the case, the deponent can only have a ground of belief, and cannot make a direct assertion, a statement on information and belief is sufficient, even in an ordinary affidavit to hold to bail, *Hobson v. Campbell (b)*; much more where the damages are of an unliquidated nature. There can be no doubt that perjury might be assigned on this affidavit, if the deponent had in reality no reason to believe that such was the amount of damage. [Lord *Abinger, C. B.*—Even if a surveyor had sworn to the amount, he could only have spoken from belief—that is, from his opinion.] It is clear that the statute 12 Geo. 1, c. 29, applies only to arrests made by the plaintiff himself, not to those made under a judge's order; *Omealy v. Newell (c)*.

(a) In Q. B., not yet reported. (b) 1 H. Bl. 245.
(c) 8 East, 364.

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Kelly and Hurlstone, contra.—First, the irregularity has not been waived. The supposed step taken by the defendant is wholly collateral to the object of this application; the action might proceed without affecting the question of the defendant's right to be discharged; and the demand of a declaration alters in no respect the plaintiff's situation. Secondly, the affidavit is bad. Although the statute 12 Geo. 1, c. 29, may not be directly binding on the Judges in making orders of this nature, yet they have always made it the guide of their discretion, and refused to authorize the arrest of a party unless satisfied that damage has been done to an arrestable amount. When, from the nature of the case, (as in cases of aggravated assault), the Judge has to form his own judgment from the facts stated in the affidavit, as to the amount of injury, no specific statement of the amount is or can be contained in the affidavit; but where, as in this case, the damage is positively measurable, the amount ought to be positively deposed to. The only cases in which a statement of belief is admitted in an ordinary affidavit of debt, are, where the plaintiff sues as executor or administrator, or as assignee: *Tidd's Pr.* 182. Here, the deponent might, at all events, have stated, that, in his judgment, the damage amounted to 63*l.*: it would then appear that he had inspected the premises, and formed his own opinion of the extent of the injury done; whereas at present the statement appears to rest altogether on belief founded upon the information of another: it is not such a statement as would form even a *prima facie* case before a jury. But further, it is consistent with the whole affidavit that *no* injury may have been committed, but that all the acts stated may have been done in the course of repairing the premises. It should have shewn that the particular acts of injury were such as would constitute waste in a tenant for years.

Lord ABINGER, C. B.—The question is, whether enough

is stated in this affidavit to justify the learned Judge in holding the defendant to bail for 50*l*. The Judges are to exercise their discretion on such applications, and, looking at the sum stated in the affidavit, to form their own judgment whether that is the amount of the damage: there is no imperative rule of construction by which they are bound. Here I see no great difficulty in forming a very probable conjecture as to the amount of the injury. The affidavit states that the defendant has been engaged for thirteen days in the process of pulling down and destroying premises of the value of 80*l*. a year, and, as the deponent believes, already to the amount of 63*l*. 11*s*. It is positive as to the nature of the damage; and, as to the amount, a surveyor himself could have said no more: it could only be matter of opinion, on an inspection of the premises. It is said that all is consistent with the acts having been done in *repairing* the premises; but I never heard, that, under the term *destroying*, anything consistent with repairing could be comprehended. If so, then in the case of an assault by tearing off the skin of the plaintiff's face and the upper part of his body, it might equally be said that it was consistent with the statement, that all was done in the necessary process of cure by a surgical operation. I think the affidavit is sufficient.

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PARKE, B., concurred.

ALDERSON, B.—I am of the same opinion. I think the principle of the case of executors and assignees governs this. The deponent has given as much information as he could reasonably be expected to give.

GURNEY, B., concurred.

Rule discharged, with costs.

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PURNELL v. YOUNG.

To a declaration in trespass qu. cl. fregit, a plea denying the close to be the plaintiff's is a denial of possession, if the defendant was a *wrong-doer*; if otherwise, of the right to the possession; but on either supposition it is a denial of title, as even possession is title against a wrong-doer; and therefore such a plea raises a question of title in the action, and prevents the Judge from certifying to deprive the plaintiff of costs, under 43 Eliz. c. 6.

Although upon *some* of the issues in trespass qu. cl. fregit the freehold or title may come in question, yet, if one special plea, which excludes all question of title, is found against the defendant, the plaintiff is entitled to full costs.

THIS was an action of trespass for breaking and entering a stable and taking a horse, and assaulting the plaintiff; to which the defendant pleaded—1st, not guilty; 2nd, that the stable was not the plaintiff's; 3rdly, as to the breaking and entering the stable, leave and licence; 4thly, as to taking the horse, that it was not the plaintiff's horse; 5thly, to the assault, son assault demesne. The issues on the first four pleas were found for the plaintiff, with one farthing damages; the issue on the last plea, for the defendant. The Judge before whom the cause was tried, certified to deprive the plaintiff of costs. The Master having taxed the costs accordingly, a rule was obtained in Easter Term by *R. V. Richards*, for the Master to review his taxation, and allow to the defendant his full costs, notwithstanding the Judge's certificate. Against this rule cause was shewn, in Trinity Term last, by

Maule, for the defendant.—The Master was quite right, and the judge had power to certify under the 43 Eliz. c. 6, to deprive the plaintiff of costs. The only statutes that apply to this case, are the 43 Eliz. c. 6, and the 22 & 23 Car. 2, c. 9. The former statute provides, that if in any action personal to be brought in any of her Majesty's Courts at Westminster, not being for any title or interest of lands, nor concerning the freehold or inheritance of any lands, nor for any battery, it shall appear to the judges of the same Court, and be so signified or set down by the justices before whom the same shall be tried, that the debt or damages to be recovered therein, in the same Court, shall not amount to the sum of 40*s.*; in every such case the judges and justices before whom such action shall be pursued, shall not award for costs to the party plaintiff

any greater or more costs than the sum, the debt, or damages so recovered shall amount unto, but less at their discretion. And the statute 22 & 23 Car. 2, c. 9, enacts, that, in all actions of trespass, assault, battery, and other personal actions, wherein the judge at the trial of the cause shall not find and certify under his hand upon the back of the record, that an assault and battery was sufficiently proved by the plaintiff against the defendant, or that the freehold or title of the land mentioned in the plaintiff's declaration was chiefly in question, the plaintiff in such action, in case the jury shall find the damages to be under the value of 40*s.*, shall not recover or obtain any more costs of suit than the damages so found shall amount unto. The construction put upon the latter statute has been, that it is limited by the exception in the statute of Elizabeth. [Parke, B.—Can you get over the numerous cases where it has been decided that the plea of leave and licence takes the case out of the statute of Charles? Had you not better go to the point whether the judge had power to certify under the statute of Elizabeth? I really think the other point is settled. This Court decided in *Hughes v. Hughes* (a), since the new rules of Hilary Term 4 Will. 4, that, on not guilty pleaded to tresp. qu. cl. fregit, the plaintiff was entitled to full costs, although he obtained less than 40*s.* damages, and the judge did not certify; but I think we were wrong in that decision. There is a possible case in which the freehold may come in question under a plea of not guilty; for instance, where special matter is by statute allowed to be proved under it: and the Court of Common Pleas have accordingly so decided in *Dunnage v. Kemble* (b). I have communicated with the judges of that Court upon this subject, and concur with them in that decision.] Many of the cases were decisions before the statute of Anne, which allowed double

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(a) 2 C. M. & R. 663.

(b) 3 Bing. N. C. 538; 4 Scott, 365.

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pleading, and the subsequent decisions have proceeded upon the authority of the former. For instance, *Martin v. Vallance* (a) was decided on the authority of *Asser v. Finch* (b), which was in the 30 Car. 2. Where the cases say, that a plea of leave and licence takes the case out of the statute, it was because formerly there was but one plea, and then the right to the soil and freehold could not come in question: but the statute of 4 Anne, c. 16, by allowing double pleading, altered this entirely. The only way to account for the decision in *Asser v. Finch*, is, that the replication admitted the defendant's title to the way, but new assigned extra viam. The reasoning of the Court is not very satisfactory. They say the plaintiff shall have full costs, "first, because the title to the way is in question upon the record, and so the case is out of the statute; and, 2ndly, upon this issue, extra viam, a title to the way is in question, viz., to what extent it is." But in such a case, it must be observed, there could be no question as to the freehold. It may be said here, that the plea that the stable is not the plaintiff's, may take the case out of the statute of Charles. In *Smith v. Edwards* (c), which was trespass for breaking the plaintiff's close, and taking away his goods; the pleas were, 1st, not guilty; 2ndly, as to the asportation, that the goods were not the property of the plaintiff. The verdict was for the plaintiff as to the breaking the close, with 5s. damages, and for the defendant as to the goods. It was held that the plea of not guilty, being, since the new rules of pleading, a special plea, took the case out of the 22 & 23 Car. 2, c. 9, but that the Judge might notwithstanding grant his certificate under the 43 Eliz. c. 6, s. 2, to deprive the plaintiff of costs, the whole record and evidence at the trial being properly taken into consideration. There, *Coleridge, J.*,

(a) 1 East, 350.

(b) 2 Lev. 234.

(c) 4 Dowl. P. C. 621.

says: "I am of opinion that we do no violence to the words of the statute, and best effect its object, if we determine that the Judge and the Court must ascertain what the action is *for* and what it *concerns*, not merely by the form of the declaration, but by the issues found for the plaintiff on the whole record. The statute does not in terms except this or that form of action: any personal action, being for an interest in land, would be within the language of the exception." It is apprehended that where a Judge certifies to deprive a plaintiff of costs, he does report that the freehold did not come in question at the trial. Mr. Justice *Coleridge* says, lastly, "I am of opinion that the same plea which is properly relied on as taking this case out of the operation of the statute of Charles, brings it within that of the statute of Elizabeth, and consequently that the Judge's certificate is operative." That decision applies to the present case; and it was a well considered judgment. [*Parke, B.*—The difficulty on the statute of Elizabeth here is, that the title to the freehold must come in question; the difficulty on the statute of Charles is, that there are so many decisions, both before and after the statute of Anne, by which the point has been established. *Peddell v. Kiddle* (a) establishes that where, in trespass qu. cl. fregit, the defendant pleads not guilty, and a justification, which does not make title to the land, upon which issues are joined, which are found for the plaintiff, with damages under 40s., still the plaintiff is entitled to full costs. Lord *Kenyon* there says, after going through the cases: "On the authority of these cases, and on the practice which has uniformly prevailed in all the Courts, we think that the plaintiff is entitled to his full costs, and that it would be dangerous now to allow any innovation to be made on a point that is so thoroughly settled as this is." It is very difficult to get over a statement which is so very

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decisive of this question.] Those cases all proceed on the authorities before the statute of Anne; on that of *Asser v. Finch* and others. Since the statute of Anne, which enables parties to try several issues in one action, they are like separate actions. It is submitted that these issues ought to be taken distributively, so as to range some under one statute, and some under the other; and this is consistent with reason and principle, and a course that is not inconsistent with any authority. The effect of the 4 Anne, c. 16, in this respect has never been considered. Since the passing of that statute, the several issues are triable like several causes; and it is reasonable that the costs of each issue should be governed by the nature and the result of it. The former decisions were applicable to single issues only. *Smith v. Edwards* is an authority to shew that one plea may be controlled by a certificate under the statute of Elizabeth, while another plea on the same record is governed by the statute of Charles. In *Wiffin v. Kincard (a)*, which was an action for assault, battery, and false imprisonment, and there was a verdict with nominal damages, the Court agreed, that, whether the evidence amounted to a battery or not, it would not prevent the Judge from certifying with respect to the imprisonment, under the 43 Eliz., and that the plaintiff was not entitled to full costs for the assault and battery, unless the Judge certified under the 22 & 23 Car. 2, c. 9. That case shews that the issues may be taken distributively. The same principle is recognised in *Briggs v. Bowgin (b)*. That was a case establishing the proposition that a plaintiff may be deprived of costs by the absence of a certificate under the statute of Charles, and the existence of one under the statute of Elizabeth. The case of *Peddell v. Kiddle*, and all such cases, proceed on the decisions prior to the sta-

(a) 2 New Rep. 471.

(b) 2 Bing. 333; 9 Moore, 628.

tute of Anne, which were all cases of one single issue; but there is no reason, when there are several, why they should not be taken distributively. *Smith v. Edwards* shews that the certificate must depend upon the whole record. If, in this case, the whole record is gone into, upon the plea of not guilty the plaintiff would not be entitled to costs, as the freehold might or might not come in question, and then it is within the statute of Car. 2, under which there is no certificate. Upon the second issue, neither property nor title necessarily comes in question, as the action might have been against a mere wrongdoer, and then proof of possession would be sufficient: *Heath v. Milward* (a). The third and fourth issues are within the statute of Elizabeth, and the plaintiff is deprived of costs as to them by the Judge's certificate.

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R. V. Richards, contra.—The Court cannot distribute the pleadings between the two statutes in the mode which has been suggested. It is not necessary now to argue as to what construction *might* have been put upon these statutes. It is enough to say that it has been settled, that, where there is a plea of leave and licence on the record, it is sufficient to take the case out of the operation of the statute 22 & 23 Car. 2, c. 9; and the plaintiff, succeeding upon it, is entitled to costs. In *Wright v. Piggin* (b), *Hullock*, B., speaks of it as a settled point: "It has, however, been since decided repeatedly, after great deliberation, that, wherever a defendant in an action of trespass quare clausum fregit pleads a special plea, the issue joined upon which is found for the plaintiff, he, the plaintiff, shall have full costs, although the damages may be under 40s., and the Judge shall not have certified that the title came in question at the trial. And the plaintiff's right to costs in such a case will not be affected by or depend upon the

(a) 2 Bing. N. C. 100; 2 Scott, 160.

(b) 2 Y. & Jer. 547.

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nature or facts of the special plea; for, although such plea should not make title to the land mentioned in the declaration, or even be such an one as to preclude the possibility of bringing the title into question therein, as, for instance, a disclaimer of title that the trespasses were involuntary, and tender of amends, or a licence, the plaintiff will still be entitled to full costs, if he obtain a verdict on that plea. The principle of these determinations is, that, where the case is such that the Judge who tries the cause cannot, in any view of it, grant a certificate, it is considered to be a case out of the statute. Whether this reasoning be right or wrong, it is supported by numerous decisions, of the propriety of which it is now too late for the Court to enquire." Before the new rules as to pleading, a plea of liberum tenementum was held to take the case out of the statute of Elizabeth, so as to prevent the Judge from certifying: *Littlewood v. Wilkinson* (a). The plea that the close is not the plaintiff's must have the same effect as the old plea of liberum tenementum. Without relying on the general issue, it is clear that the second plea puts in issue the plaintiff's interest in the land, no matter how small the interest may be; as in *Butcher v. Butcher* (b), where the interest was merely a possessory one claimed against the rightful owner, who had entered upon the land. And if that plea takes the case out of the statute of Elizabeth, it is one upon which a verdict under 40s. will carry full costs without a certificate under the statute of Charles, because the title to land, viz. the title requisite to maintain trespass, must come in question.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—A motion was made in this case some time ago, for the Master to tax the full costs of the plaintiff,

(a) 9 Price, 314.

(b) 7 B. & Cr. 399; 1 Man. & R. 220.

notwithstanding the Judge's certificate to deprive him of costs, under the statute of 43 Elizabeth. Cause was shewn, and most of the cases bearing on the subject were cited. We, who heard the argument, my Brothers *Bolland*, *Alderson*, and *Gurney*, and myself, have considered it, and are of opinion that the rule ought to be made absolute.

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It was an action of trespass for breaking and entering a stable and taking a horse, and assaulting the plaintiff. There were several pleas:—first, not guilty; secondly, that the stable was not the plaintiff's; thirdly, leave and licence, as to the breaking and entering; fourthly, as to taking the horse, that it was not the plaintiff's; fifthly, to the assault, son assault demesne. The issues on the four first pleas were found for the plaintiff, with one farthing damages, and that on the last for the defendant, and the learned Judge certified to deprive the plaintiff of costs.

It was contended on the part of the defendant, that the Judge might certify under the statute of Elizabeth, because the action was not "concerning any title or interest of lands." For the plaintiff, it was insisted that it was.

If there had been nothing but the general issue and licence pleaded, and the case had occurred before the New Rules, the Judge might have so certified; unless it had appeared upon the evidence on the general issue, *on the trial* (a), that the title had come in question; which might have been the case on that plea, (independently of any statutory provision), because it was a denial that the defendant had trespassed on the *plaintiff's* close, and put in issue the fact that *it was his close*, as well as the fact that the defendant had entered upon it. Of that title, possession would be *primâ facie* evidence against all, and it would *constitute a good title against a wrong doer*, and

(a) *Wright v. Piggin*, 2 Yo. & Jer. 544; *Smith v. Edwards*, 4 Dowl. P. C. 621.

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none against the person lawfully entitled to the possession, who, though the plaintiff had the actual possession, might have shewn that he (the defendant) was lawfully entitled to it. The plea of not guilty, however, did not *necessarily* raise a question of title, for the defendant might not really have contested it, and had no other mode of disputing the fact of the trespass than by pleading not guilty. The real nature of the question on the trial would therefore govern the certificate, as it did in *Wright v. Piggin (a)*, where the point in dispute was, whether a term had ended or not. But the plea denying *the close to be the plaintiff's*, since the New Rules, is a denial of the *plaintiff's title to the close* to the same extent that he would have been obliged to prove it before under the general issue (*b*); that is, it is a denial of possession, if the defendant was a *wrongdoer*; if otherwise, of the right to the possession; but, in either supposition, it is necessarily a denial of *title*: for, even in the former case, possession is *title* against a wrongdoer, and therefore the plea raises a question of title in the action, and prevents the Judge from certifying.

It was then contended, that the statute 22 & 23 Car. 2, c. 9, applied to the case, and that the plaintiff would not be entitled to any more costs than damages, without a judge's certificate; for that, on these pleadings, the "freehold or title might have come in issue," either on the plea of not guilty, (as it certainly might by statute 11 Geo. 2, c. 19, s. 21), or the plea that the stable was not the plaintiff's; and it was said that he ought not to have full costs, unless the pleadings upon the *whole record* excluded the possibility of the title coming in question. It was said that most of the cases in which it had been held that a special plea of licence, or the like, which shews that title could not come in question, and therefore prevents the

(a) 2 Yo. & Jer. 544.

(b) *Heath v. Milward*, 2 Bing. N. C. 106; 2 Scott, 160.

operation of the statute, had arisen before the statute of 4 Anne, c. 16, allowing double pleading, and therefore do not apply to a case in which there are several pleas. And, if the matter were *res integra*, it would seem not unreasonable so to hold: but the weight of authority is so very great, in many cases since the statute of Anne, that, wherever there is a special plea (which excludes all question of title) found against the defendant, the plaintiff is entitled to full costs, that it is impossible now to decide otherwise. In *Peddell v. Kiddle (a)*, the question was considered as finally concluded, and Lord Kenyon said it would be dangerous to allow any innovations to be made on a point so thoroughly settled. Therefore the rule must be made absolute. It will henceforth be prudent for defendants in actions of trespass of a trifling nature, to abstain from denying that the locus in quo is the plaintiff's.

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Rule absolute.

(a) 7 T. R. 659.

KINE v. SEWELL.

SLANDER.—The first count of the declaration stated, that, before and at the time of the committing of the grievances by the defendant, the plaintiff carried on the trade and business of a carpenter and builder, in which trade and business he had theretofore been and then was retained and employed by one Stephen Balcombe to per-

A., having undertaken to build a house for B., employed C., a carpenter, to do some of the wood-work, for which A. had given an estimate. The

bill sent in having exceeded the estimate, B. applied to D. to recommend him a surveyor to measure the work, upon which D. told B. that he had seen C. take away some of the quarterings; B. informed A. of it, who came to D. and asked him, did he say so; to which D. answered, "Yes, I saw the man employed by you take from B.'s house two long pieces of quartering: I hallooed to the man." In an action of slander, brought by C. against D., the Judge left it to the jury to say whether the words imputed felony; and if they thought they did, told them that still the plaintiff was not entitled to recover, unless he shewed express malice, or the jury believed from the circumstances that the defendant was actuated by malicious motives:—*Held*, that the direction was right.

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form certain work in and about the erection and building of a certain dwelling-house, which the said S. Balcombe was then retained to manage and complete for and at the request of one William Barton: that the said plaintiff, in the performance of his work as such carpenter and builder as aforesaid, was intrusted with the care and disposal of divers large quantities of timber, the property of the said S. Balcombe, then being in and upon the premises for the purpose of being used and employed by the plaintiff in the building and erection of the said dwelling-house: that the defendant, intending to injure the plaintiff in his good name, fame, and credit, and in his said trade and business, and to bring him into public scandal, infamy, and disgrace with and amongst all his neighbours, and other good and worthy subjects of this realm, and to cause it to be suspected and believed by those neighbours and subjects that the plaintiff had been and was guilty of larceny as thereafter stated to have been charged and imputed to him by the said defendant, and to subject him to the pains and penalties by the law provided against and inflicted upon persons guilty thereof, and to harass, impoverish, and ruin the plaintiff, theretofore, to wit, on &c., in a certain discourse which the defendant then had of and concerning the plaintiff, and of and concerning the building and erection of the said dwelling-house, and of and concerning the said timber so in the care and disposal of the plaintiff as aforesaid, in the presence and hearing of the said S. Balcombe, and of divers other good and worthy subjects of this realm, falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning the building and erection of the said dwelling-house, and of and concerning the timber so in the care and disposal of the plaintiff as aforesaid, the false, scandalous, malicious, and defamatory words following (with innuendos as to persons), that is to say:—"I saw the man employed by you take from Mr. Barton's house and carry away two long

pieces of quartering, 4 by 2½, as much as he could carry ; I halloosed to the man.”—There were two other counts in which similar words were charged to have been spoken in the presence of Barton and one Robert Fosdyke. The declaration alleged as special damage, that, in consequence of the premises, Balcombe had wholly neglected and declined further to employ the plaintiff, whereby he had been deprived of great gains, profits, &c., and otherwise greatly injured and damnified. Plea, Not guilty.

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At the trial before *Alderson*, B., at the Middlesex Sittings in the present term, it appeared that Balcombe having engaged to build a house for Barton, had employed the plaintiff as a carpenter to do some part of the work for which Balcombe had given an estimate, amounting to about 16*l.*; but, in consequence of some joists having been omitted by mistake out of the estimate, the bill for the work amounted to 29*l.* Barton being dissatisfied with this, went to the defendant and asked him to recommend him a surveyor to measure the wood-work. The defendant informed him that he had seen the plaintiff take away some of the quarterings, upon which Barton went to Balcombe and informed him of it. Balcombe then went to the defendant and said, “I am told you say that you saw my man Kine take away some of the quarterings from Mr. Barton’s premises,” upon which the defendant spoke the words stated in the declaration. Balcombe communicated this to the plaintiff. It appeared that another person had been employed in the work, of the name of Fosdyke. The plaintiff went to the defendant’s, and sent for Fosdyke there, and on his coming said to the defendant, “Is this the man?” Upon which the defendant said, “No—you are the man.” The conversation with Barton, as stated in the declaration, was not proved. It also appeared from the evidence, that though, upon the first information being given by the defendant, the plaintiff’s wages had been stopt by Balcombe, he said that no wood

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had been taken away that he was aware of, and that he did not believe that any had been taken, and Fosdyke also said that none could have been taken without his missing it. The learned Judge left it to the jury to say whether they thought the defendant meant to impute felony to the plaintiff? But if he did, still that the plaintiff was not entitled to recover unless he shewed express malice, or the jury believed the defendant was actuated by malicious motives. The jury having found for the defendant,

Humfrey now moved for a new trial, on the ground of misdirection.—The learned Judge was wrong in laying the case before the jury in the way he did, as the statement by the defendant to Barton was not a privileged communication, and therefore not protected. Barton was not inquiring about the loss of the wood, but merely asking the defendant to recommend him a surveyor. The case of *Too-good v. Spyring* (*a*) is no authority in support of the law as laid down by the learned Judge in this case. It was there held, that the communication to Taylor, the fellow-workman of the plaintiff, in the plaintiff's absence, was unauthorized and officious, and not protected, although made in the belief of its truth, if it were in point of fact false. [*Parke, B.*—There the communication to Taylor was purely gratuitous.] Taylor had an interest, because he was a fellow-workman: it was proved that a cellar had been broken open, and he was the only other workman. [*Alderson, B.*—No, he was not a fellow-workman on the premises where the cellar had been broken open, and therefore he had no interest. *Parke, B.*—The difference is, that here Balcombe is the party interested. The communication to Barton was not proved. Then the question is, whether the other two communications are not

a) 1 C. M. & R. 181.

privileged.] It is not the case of a person wanting information upon the subject; Balcombe went merely in consequence of having heard the statements made by the defendant. [Parke, B.—Yes, it is. Is a man's mouth to be closed when I ask him if he has seen another man take away my timber? The decision in *Toogood v. Spyring* is by no means new; it is only an instance.] Here, no offence had been committed by the plaintiff; he is admitted to be an innocent man; nobody believes that he took away the wood; therefore, as against him, the charge of the defendant is false. [Parke, B.—If the defendant bonâ fide believed him to be the man, is he liable? Is a man's mouth to be closed when he is asked, did he see another person steal the inquirer's property? The question is, whether a party has a right to answer questions put to him by a person interested in the matter. I have always understood that such a party, if he believes the statements to be true, is excused; but, in such a case, it ought to be left to the jury whether it is probable, from the words and circumstances, that he so believed it.] In *Child v. Affleck (a)*, it was held, that in an action by a servant for a libel, in the form of a character, it is necessary to shew implied malice, by directly negating the charge, or express malice aliunde. What is there said by *Littledale, J.*, is important (*b*):—"If, indeed, the plaintiff had distinctly proved the falsehood of the statement, the case would have assumed a different shape." No doubt in that case the mistress believed that the charges she made were true. [Parke, B.—The expression "assuming a different shape" means with reference to the jury, as a distinct proof of the falsehood of the charge might have raised a strong inference of malice.] In *Martin v. Strong (c)*, it was held that words spoken by a subscriber to a charity, in answer

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(a) 9 B. & Cr. 403; 4 Man. & Ry. 338.

(b) 9 B. & Cr. 405, 406.

(c) 5 Ad. & E. 535.

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to inquiries by another subscriber, respecting the conduct of a medical man in his attendance upon the objects of the charity, are not, merely on account of those circumstances, a privileged communication. There it was not left to the jury to find express malice. [*Parke, B.*—The question there was, whether it was a privileged communication. If the election was over, there could be no interest. *Alderson, B.*—The question about which the subscribers had met had been determined one way or other before the words were spoken by the defendant, and the Judge was of opinion that the defendant had no right to say anything about the matter.]

PARKE, B.—I am of opinion that there must be no rule. This case does not go a step farther than *Toogood v. Spy-ring*. I feel satisfied that there is not a doubt as to the propriety of the law that is there laid down; and I cannot doubt that it is a perfectly privileged communication, if a party who is interested in discovering a wrong doer, comes and makes inquiries, and a person in answer makes a discovery, or a bonâ fide communication which he knows, or believes, to be true, although it may possibly affect the character of a third person. Then the consequence of that is, that no person whose character is so injured in the course of that bonâ fide communication, can recover any damages in an action against the person who has expressed himself in that transaction in a way so as to affect his character, unless he can shew that the person who made that communication was interested in so making it; and he must make out from some of the facts of the case that the communication was not made bonâ fide by the defendant. I have not the least doubt about that, and that is the express view the learned judge took of it, and I think he has very properly left that question to the jury.

Now the only ground upon which this application is made, is upon the authority of the case of *Martin v. Strong*;

and I take it from the report of that case, that a communication was made by the defendant to Mrs. Hicks, reflecting upon the plaintiff's character. I think she had no right to inquire into his character, more especially at that time, from the mere simple circumstance of her being a subscriber to the institution in which he was employed as an assistant; for it appears a communication was made at the place where the meeting had been held, but when the object of that meeting had been answered; then she had no longer any occasion to make any inquiry into the plaintiff's character. The report states that Mrs. Hicks, a subscriber, questioned the defendant, either after or before he had left the chair, as to some complaints which had been made during the meeting, and the defendant made an answer in the words set out in the declaration. Then the learned judge told the jury, that, supposing all that passed during the meeting to be in the nature of a privileged communication, the meeting was not necessarily over when the defendant left the chair: that is the real question. The learned judge then desired the jury to consider whether the conversation was fairly a part of the proceedings of the meeting; and the jury found in effect that it was not. Now the Court of King's Bench say that there is not a sufficient reason for the conversation between the two parties, to constitute a privileged communication. If the observations had been made in a matter of contest, and the contest was whether that person should be elected, I own it appears to me that it would have been a privileged communication. As it is, however, there seems to me no contradiction between the cases of *Martin v. Strong*, and *Toogood v. Spryng*.

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BOLLAND, B., concurred.

GURNEY, B.—I am entirely of the same opinion. I think the learned judge directed the jury very properly.

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ALDERSON, B.—The case of *Martin v. Strong* seems to have turned entirely upon the question (and the learned judge appears to have so considered it) whether that which took place was any part of the proceedings of the meeting. The learned judge left that question to the jury, and the jury found it was not. But then it is clear that a person who subscribes to a charity has no right to talk of the concerns and character of a medical man employed in the charity, and thus cause his past conduct to be the general topic of conversation, unless it be absolutely necessary to carry some particular object into effect. Moreover, no person can say Mrs. Hicks and the defendant had a right to converse upon the moral characters of all the officers belonging to the charity. That seems to have been the opinion of the Court of King's Bench, and well it might have been.

Rule refused.

WOODMAN v. GOBLE.

The common order for "time to plead, pleading issuably," applies to the plea only.

WHATELEY, on a former day in this term, obtained a rule to shew cause why the judgment should not be set aside for irregularity, with costs. It appeared that the defendant had obtained an order "for ten days' time to plead, pleading issuably:" a plea was delivered in due time, and the plaintiff replied, concluding to the country, and added the similiter. The defendant struck out the similiter, and demurred specially to the replication. Upon this the plaintiff signed judgment for want of a rejoinder, on the ground that the special demurrer was not in compliance with the terms the defendant was under to plead issuably. —*Whateley* moved to set this judgment aside on two grounds; first, that the terms "pleading issuably," did not extend beyond the plea; and secondly, that the de-

defendant not being under terms to rejoin gratis, was entitled to a rule to rejoin, which had not been given. Against this rule

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J. L. Adolphus shewed cause.—The question is, whether, where a defendant is under the terms of pleading issuably, those terms are confined to the plea; or whether they are applicable to all his subsequent pleadings. [*Parke, B.*—There is nothing in the other objection. It is not necessary to have a rule to rejoin where there is only the similitur to be added. *Alderson, B.*—The question is, whether the party agrees to waive all matters of form, and plead subsequently nothing but substance.] The first case is that of *Dewey v. Sopp* (a), where the Court said, that a defendant's being under terms to plead issuably is not to oblige him at all events to join issue to the country; but only where the replication offers a fair issue, and affords no reasonable cause of demurrer. That assumes that the terms are binding beyond the plea. In *Bell v. Da Costa* (b), the defendant, being under terms, demurred specially to the replication, and the Court said, the mere question in these cases was, whether the objections were such as might be relied on upon a general demurrer. That shews that he cannot take any objection upon special demurrer. Now here the demurrer is not only special but frivolous. [*Parke, B.*—If frivolous, you ought to have moved to set it aside.] *Sawtell v. Gillard* (c) is an express authority upon the point. There the defendant, being under terms to plead issuably, demurred specially to the replication; and *Abbott, C. J.*, says, "admitting that this special demurrer is *bonâ fide*, and that the defendant may sustain prejudice by its disallowance, still we must act upon general rules. The only general rule which the

(a) 2 Stra. 1185.

(b) 2 Bos. & Pull 446.

(c) 5 D. & R. 620.

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Court can lay down is, that where a party has obtained time on the terms of pleading issuably, and by his pleading fails to bring the merits of the case, or some question of fact, or some question of law arising upon the facts in issue, he does not comply with the conditions of the order." [*Alderson, B.*—If there are substantial grounds for a special demurrer, the party should apply to a Judge for leave to demur, notwithstanding he is under terms to plead issuably; that I always thought the proper course. *Parke, B.*—It is reasonable to suppose that a defendant understands by the terms "pleading issuably," that he undertakes to do so to the declaration which he knows. If the matter were *res integra*, I should think that the terms ought not extend beyond the plea, and that the defendant should be at large afterwards; but we must be governed by the cases.] In *Gisborne v. Wyatt (a)*, the Court decided that the defendant, being on terms to plead issuably, ought not to have demurred specially to the replication, and ordered some of the causes assigned to be struck out. [*Parke, B.*—The Court there took an intermediate course—they did not decide on the point. The case is not an authority either way, as the parties acquiesced in the suggestion of the Court.] It is in favour of the plaintiff, because the defendant lost every thing without any equivalent. [*Alderson, B.*—The Court made him pay the costs.] In *Nanney v. Kenrick (b)*, *Bayley, J.*, says, in reference to *Langford v. Waghorn (c)*, "a special demurrer is not an issuable plea, but if there are good grounds the Court will sometimes strike out the causes." Two authorities may be relied upon on the other side; *Betts v. Applegarth (d)*, and *Barker v. Gleadow (e)*. In *Betts v. Applegarth*, where the plaintiff had signed judgment on the ground that the defendant, being under terms to plead issuably, had demur-

(a) 3 Dowl. P. C. 505.

(b) 1 Dowl. P. C. 610.

(c) 7 Price, 670.

(d) 4 Bing. 267; 12 Moore, 501.

(e) 5 Dowl. P. C. 134.

red to the replication, the Court undoubtedly set aside the judgment as irregular. In *Barker v. Gleadow*, the question was much discussed in the Bail Court. It was certainly there held, that the terms "pleading issuably" applied only to the plea; but that was the decision of a single judge, supported only by a single case. But it is assumed there that the demurrer was good and bonâ fide, which distinguishes that case from this. Here it is contended that this demurrer is not bonâ fide or for good cause. [*Alderson, B.—Coleridge, J.*, seems to consider that *Sawtell v. Gillard* was decided after *Betts v. Applegarth*, which is not the case.] Though that judgment was delivered after consideration, and is undoubtedly entitled to much weight, it is supported only by one previous case, not fully considered, and is opposed to the whole current of earlier authorities.

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Whateley, contra.—If the terms "pleading issuably" are to extend to all the subsequent pleadings, it would entail great hardship upon the defendant. Here a declaration is delivered, venue Northumberland, to which the defendant is obliged to plead in eight days, six of which are occupied in sending into the country and receiving an answer. He is compelled to apply for time, and further time is given on the terms that he shall "plead issuably," which he does. Is the plaintiff, after that, to be let loose from all regularity in his pleadings? [*Parke, B.*—If it were not for authorities, it would seem reasonable to say that the word "pleading" in "pleading issuably," should not have a more extended meaning than the word "plead" in the first part of the sentence—"time to plead."] The words "time to plead, pleading issuably," mean that the defendant shall have time to plead a plea which goes to the merits. *Dewey v. Sopp* merely decided that the demurrer must be for good cause. *Sawtell v. Gillard* is

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certainly against the defendant; but that case is not now law: it was decided not to have any weight in *Betts v. Applegarth*. There *Best*, C. J., in delivering the judgment of the full Court, says: "The order for time under terms of pleading issuably, must apply to the existing state of the cause at the time it is issued, and does not extend to cover subsequent errors. If it did, parties might go on blundering to the end of the cause. In *Sawtell v. Gillard* the attention of the Court was not called to this distinction." That case was confirmed, after much deliberation, in *Barker v. Gleadow*, where all the authorities were reviewed and observed upon. It appears to be more than the opinion of the learned Judge who decided it. It is the latest authority, and is expressly in favour of the defendant.

Cur. adv. vult.

On a subsequent day,

PARKE, B., said.—We have consulted the Judges of the two other Courts in this case, and we are all agreed that the true construction of the common order for time to plead is, that the terms "pleading issuably" apply to the *plea* only, and do not bind the defendant as to the rejoinder, or other subsequent pleadings; adopting the authorities of *Betts v. Applegarth*, and *Barker v. Gleadow*: and therefore the rule will be absolute.

Rule absolute.

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SMITH v. WINTER.

W*ALLINGER* moved for a rule calling on the plaintiff to shew cause why he or his attorney should not produce to the defendant, or his attorney, for the purpose of inspection, &c., a certain deed to which the plaintiff was an executing party, and which there were grounds for believing was in their possession. In one of the pleas to an action on certain bills of exchange, it was alleged that the defendant was liable, if at all, only as surety, and that the plaintiff had given time to the principal debtor without the consent of the defendant; the deed so giving time was the one required. [*Parke, B.*—Is the defendant a party to the deed?] Not an *instrumentary* party, but he is a party *in interest*. In *Bateman v. Phillips* (a), the rule was granted on the express ground, as stated by *Chambre, J.*, of the applicants being, though “not instrumentary parties, yet parties in interest.” And surely a surety is an interested, though not an instrumentary party, to a deed which releases or gives time to his principal. [*Gurney, B.*—Is not this a fishing attempt to get at evidence in the plaintiff’s possession?] Not more so than in every case where such an application is made and allowed. Of course, in all these cases the party wants the evidence that is in possession of the opposite side; as where lessor applies against lessee, *Doe v. Slight* (b); and even though the object were to find defects, that has been held to be no ground for refusal; *King v. King* (c). In *Browning v. Aylwin* (d), the Court ordered the defendant to grant to the plaintiff inspection of his book, without which the plaintiff could not have sued him for negligence.

Where an action on certain bills of exchange was brought against a defendant, who pleaded that he was liable, if at all, as a surety only:—*Held*, that he was not entitled to the inspection of a deed in the plaintiff’s possession, by which it was suggested time had been given to the principal debtor, but to which deed the surety was no party.

(a) 4 Taunt. 157.

(b) 1 Dowl. P. C. 163.

(c) 4 Taunt. 666.

(d) 7 B. & Cr. 204.

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PARKE, B.—In that case the book contained the contract which the plaintiff had employed the defendant to make as his broker; there was a privity. We do not think the defendant here is such a party as entitles him to inspect the deed. He must give notice to produce in the ordinary way.

Rule refused.

ANGUS v. WOOTTON.

It is not necessary for an execution-creditor, appearing on a motion under the Interpleader Act, to produce an affidavit.

BARSTOW had obtained a rule on behalf of the sheriff, under the Interpleader Act.

Rogers, for the claimant, objected to the right of the execution creditor to be heard, inasmuch as he had produced no affidavit. He cited *Powell v. Lock (a)*.

PARKE, B.—So far as relates to the execution creditor, an affidavit from him is not wanted. The case of *Powell v. Lock* was that of a claimant.

The Court directed an issue.

(a) 3 A. & E. 315; 4 Nev. & Man. 852.

BURCH v. POINTER.

Where the defendant does not appear, but an appearance is entered for him according to the statute, it is not necessary to deliver a copy of the bill of costs before taxation, notwithstanding the rule of this Court, M. T. 1 Will. 4, s. 10.

WORDSWORTH had obtained a rule for the Master to review his taxation in this cause, on the ground that a copy of the bill of costs had not been delivered prior to taxation. It was stated in the affidavit in answer to the motion, that the defendant had not appeared to the action, but that an appearance had been entered for him according to the statute.

Humfrey shewed cause.—The rule of H. T. 4 W. 4, s.

17, expressly says, that "notice of taxing costs shall not be necessary in any case when the defendant has not appeared in person, or by his attorney or guardian, notwithstanding by the General Rule of T. T. 1 Will. 4, s. 12." By the former rule, one day's notice of taxation was required to be given. [*Parke, B.*—There is a rule of this Court, M. T. 1 Will. 4, s. 10, which requires that the copy of the bill of costs shall be delivered.] That is inconsistent with the subsequent rule of all the Courts, H. T. 4 Will. 4, s. 17, and must be taken to have been repealed by it. It would be absurd to make it necessary to deliver a copy of the bill of costs, when no notice of taxation need be given.

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Wordsworth, in support of the rule. The rule of this Court, M. T. 1 Will. 4, s. 10, is imperative, that a bill of costs shall be delivered one day before taxation. [*Parke, B.*—The rule of this Court is superseded by the rule of all the Courts, H. T. 4 Will. 4, s. 17.] It is submitted that that rule only repeals or restricts the rule of T. T. 1 Will. 4, s. 12, to which it refers, but does not affect the rule or the practice of this Court.

PARKE, B.—The rule of this Court in its terms applies only to cases where there is some attorney of the party whose costs are to be taxed. Then how is the plaintiff to deliver a copy of the bill of costs where there is no recognized attorney, the party not having appeared? It is quite clear that no notice of taxation need be given: then it would be absurd to require the delivery of a copy of the bill of costs. But independently of that, it is clear that the rule which abrogates the necessity of notice, impliedly abrogates the necessity of delivering a copy of the bill of costs.

Rule discharged with costs.

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WALLER v. ANDREWS and Another.

By a memorandum of agreement, certain marsh lands were demised by the plaintiff to the defendant, subject to a condition that the defendant should pay all outgoings whatsoever, rates, taxes, scots, &c., whether parochial or parliamentary, which then were or should be thereafter charged or chargeable upon or on account of the said marsh lands (the then present land-tax only excepted):—*Held*, that an extraordinary assessment made by Commissioners of Sewers upon the lands, for a work of permanent benefit to the land, was within the meaning of the agreement.

The assessment was made in certain proportions upon the owners and occupiers. For four years the defendant (the tenant) paid, in the first in-

stance, both his own share and that of the plaintiff, (his landlord), and upon each half-year's settlement of accounts for rent due, with the plaintiff's agent, who was ignorant of the agreement, the sum so paid was allowed towards the rent, and receipts were given for the balance:—*Held*, in an action brought upon the agreement, to recover the sums so allowed as arrears of rent, that the facts supported a plea of payment.

DEBT.—The declaration stated that theretofore, to wit, on the 17th of April, 1826, by a certain memorandum of agreement then made and entered into between Daniel Smith & Son, therein described as surveyors and land agents, for and on behalf of the plaintiff, of the one part, and the defendants of the other part, certain marsh lands and premises, therein particularly mentioned and described, were demised by the plaintiff to the defendants, for the full end and term of fourteen years, from the 1st of January then next, at and for the clear annual rent of 400*l.*, payable half-yearly by equal portions, subject to, amongst others, the following conditions and provisions, to wit, that *the defendants should pay and discharge all outgoings whatsoever, rates, taxes, scots, &c., whether parochial or parliamentary*, that then were or should be thereafter charged or chargeable upon or on account of the said marsh lands (the then present land tax only excepted). The declaration then alleged, that, although the defendants did, in the first and several succeeding years of the said term continually until the 1st of January, 1835, pay to the plaintiff a certain part of the annual rent of 400*l.* which accrued due under and by virtue of the said demise in each and every of those years, to wit, the sum of 350*l.* in each of those years for and in respect of the demised premises, yet they had not at any time paid the residue of the said rent of 400*l.* for any or either of those years. It then went on to allege, that there was and remained due to the plaintiff the sum of 50*l.*, parcel and residue of the said sum of 400*l.*, for rent for and in respect of the demised premises, under and by virtue of the de-

mise, for the first year of the said term, to wit, on the 1st of January, 1838. It also contained a similar averment for the 2nd, 3rd, 4th, 5th, 6th, 7th, and 8th years of the term.

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Pleas, first, that after the accruing of the causes of action in the declaration mentioned, and before the commencement of the suit, to wit, on &c., and on divers other days and times between that day and the commencement of the suit, they, the defendants, paid to the plaintiff, and the plaintiff then and there accepted of and from the defendants, divers sums of money, together amounting to the aggregate amount of the said several sums of 50*l.*, parcel and residue &c. in the said declaration mentioned, and thereby demanded, to wit, the sum of 400*l.*, in full satisfaction and discharge of the said several sums of 50*l.*, parcel and residue &c. in the declaration mentioned, and thereby demanded. Secondly, as to 175*l.*, parcel &c., the Statute of Limitations. The replication took issue on both pleas.

At the trial before Lord *Denman*, C. J., at the last Assizes for the county of Kent, it appeared that in the year 1831, the commissioners of sewers for the eastern division of Kent decreed that an extraordinary expenditure should take place in the rebuilding and erecting a sluice and other works at a place called Stonar, in Kent, the expence of which exceeded the sum of 5000*l.* In consequence of so large an expenditure upon a *permanent* work, the commissioners of sewers summoned a jury, who returned an inquisition; and the commissioners, on the 7th of January, 1831, made their decree, assessing the owners and occupiers of lands specified in a schedule, (including the premises demised by the plaintiff to the defendants), in certain sums payable at stated periods, and decreed that four-fifths of such sums should be taxed, assessed, and charged upon the owners of such lands, and the remaining one-fifth upon the occupiers respectively. It ap-

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peared that the defendants were in the habit of paying their rent to Messrs. Buller and Rashleigh, the agents of the plaintiff; and they not having seen the agreement between the parties (which had been accidentally mislaid by a third person), deducted from the rent, during the years 1831, 1832, 1833, 1834, and 1835, the four-fifths of sewers-rate or scot, which, by the decree of the Commissioners, was charged upon the owners, and which had been paid in the first instance by the tenants, and gave receipts for the balance. The one for 1831 was in the following form:—"Received of Mr. Andrews the sum of 171*l.* 18*s.* 10*d.*, balance of a half year's rent at Slodmarsh, due at Midsummer last to Thomas Waller, Esq., for whose use it is received by us.

"Buller & Rashleigh."

And on the back of the receipt the account was thus stated:—

" Rent	-	-	-	-	-	-	£ 200
Land Tax	-	-	-	£	6	5	0
Scot	-	-	-		21	16	2
Cash	-	-	-		171	18	10
							<hr/>
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And the other receipts were generally stated to be for the balance of rent. In December 1835, the agreement was discovered, and the landlord not only refused to allow a deduction for the landlord's scot in future, but claimed to be repaid the sums which had been allowed by the agents in the previous accounts. On the part of the defendant, it was contended that this scot was not one which by the agreement he was bound to pay; but that even if it was, the rents had been acknowledged by the accounts to be paid, and it could not now be recovered. The learned Judge was of opinion that this sewer's-rate, though extraordinary, was a parliamentary assessment within the

meaning of the agreement, and that the defendant did not, by the deductions allowed him in account, support his plea of payment; and having directed the jury accordingly, they found a verdict for the plaintiff for 87*l.* 4*s.* 8*d.*; but the learned Judge gave the defendant leave to move to enter a nonsuit, if the Court should be of opinion that this was not a scot or tax within the meaning of the agreement, or to enter a verdict for the defendant, if they should think the plea had been proved. *Platt* having in Michaelmas Term last obtained a rule accordingly—

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Thesiger and *Channell* now shewed cause.—By the agreement the defendants undertake to pay and discharge “all outgoings whatsoever, rates, taxes, scots, &c., whether parochial or parliamentary, that then were, or should be thereafter, charged or chargeable upon or on account of the said marsh lands (the present land tax only excepted);” which are terms sufficiently large to include this sewers’ rate. The words “whether parochial or parliamentary” are meant as words of extension, and not of qualification. But, even admitting those words to be restrictive, this is strictly a parliamentary scot. The land demised is called marsh land, and it is reasonable that the covenant should be construed with reference to the nature of the subject-matter demised. The agreement provides for future as well as present taxes, so as to comprehend contingencies of this nature: the words are, “that then were, or should be thereafter, charged or chargeable.” There is an express exception of the land tax, and of that only. If however the liability of the tenant is confined to the payment of taxes strictly parochial or parliamentary, the defendants are still liable, for this may be correctly termed a parliamentary scot, having been imposed by the commissioners under the authority of Parliament. Secondly, as to the question of payment. The circumstance of the plaintiff’s agents, who made these allowances, having been

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ignorant of the agreement, clearly shews that the allowances were made by mistake, and the Court will assist the plaintiff in recovering back that which it is against good conscience that the defendants should retain. The defendants, to conclude the plaintiff, must shew either a payment in fact, or a receipt for the money.

Platt and Starr, contra.—The covenant must be construed with reference to the intention of the parties, to be collected from the language of it: and the intention was to limit the liability of the tenants to payment of such “rates, taxes, or scots,” as are strictly parochial or parliamentary. This is clearly not a parochial rate. Neither is it a parliamentary scot or tax. Though the right to impose both classes may be derived from statute, yet each takes its designation from the mode in which that right is carried into operation. Thus, the power to make a poor rate is given by statute; yet, from the mode of levying it, it becomes a parochial tax. The commissioners of sewers may act by virtue of old statutes, but that circumstance alone is not enough to render their assessment a parliamentary tax. [*Gurney, B.*—Is not the land tax, which is a parliamentary tax, similar to this?] No, because that is an impost of a fixed sum specified by Parliament, and others are employed as mere instruments for carrying the act of the legislature into effect. No statute directs specifically what sum is to be raised by the commissioners of sewers. There is also authority for saying that this assessment is not a parliamentary tax. In *Brewster v. Kitchel (a)*, Lord Holt observes: “There be other taxes not parliamentary, as repair of churches, *commission of sewers*; for any imposition which takes away part of his goods or rent, is a tax.” It is well known that when the commissioners of sewers want a sum for any extraordinary

(a) 2 Salk. 615; 1 Ld. Raym. 318; 1 Salk. 198.

purpose, they apply to Parliament and obtain a specific act, and then it becomes a parliamentary tax. It is said that the word "scot" has an appropriate and peculiar meaning applicable to this kind of tax; but according to the interpretation of it in Spelman, 505, it signifies only "a customary contribution laid upon all subjects according to their ability;" and to the same effect in Cowell's Interpreter of Law Words,—“a customary contribution upon all subjects after their ability.” But the intention of the parties, at all events, must be restricted to ordinary taxes, and cannot be construed to extend to one of an extraordinary kind, arising upon an unforeseen casualty. Secondly, the plea of payment is well supported by the evidence. If the whole rent was not paid in money by the tenant to the landlord, it was allowed in account, which is the same thing. The whole rent means the sum advanced and allowed on account of the landlord; and the case is the same as if the money had been returned by the landlord after payment of the entire rent.—They cited *Bramston v. Robins* (a), *Andrew v. Hancock* (b), *Skyring v. Greenwood* (c), and *Jeffs v. Wood* (d).

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Cur. adv. vult.

The judgment of the Court was afterwards delivered by

PARKE, B., who (after stating the facts) said—The first question in the case was, whether a sewer's rate on the landlord, in respect of the permanent improvement of the land by a new sluice, falls within the terms of the agreement. We think it does; for, though the authority of Lord Holt (e) raises a doubt whether this could be properly considered as a *parliamentary tax*, and therefore, if

(a) 4 Bing. 11.

(b) 1 Bro. & B. 37.

(c) 4 B. & C. 281.

(d) 2 P. Wms. 298.

(e) 2 Salk. 615.

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the words "parliamentary taxes" only had been mentioned, it might have been questionable whether the sewer's rate was included, yet, when such very extensive words as those in the agreement are used, that is, "all outgoings, rates, and scots," which last word is *commonly* applied to sewer's rates *on marsh lands*, we think that the sewer's rate is included. It is a "scot," and would be comprised in the terms "all *parliamentary* scots," though not perhaps properly and technically so, as not being imposed *directly* by parliament, but by commissioners deriving their authorities under an act of Parliament.

The next question is, whether, on the evidence in the case, the plea of payment was proved. What appears to have been done was this:—On each half year's settlement for the rent due, the landlord's sewer's rate, which had been paid by the tenant, was allowed *as a part payment of the rent* by the tenant, and a receipt given for the balance, expressing it to be such. This amounts to an agreement that this portion of the rent shall be considered as paid, and places the parties in the same situation as if the amount had been actually paid in money to the landlord, and then returned by him to the tenant to repay the sewer's rate, which he had disbursed. Such a transaction may be described in pleading as payment: *Bramston v. Robins* (a), and see the case of *Wade v. Wilson* (b). If there had been any fraud on the part of the tenant, in making the agreement with the landlord, that the sewer's rate paid should be allowed as payment—if, for instance, he had wilfully misrepresented the contents of the lease—then, indeed, the whole agreement would probably have been rendered void, and there would have been no payment; nor would there have been any if the agreement had been *conditional* that the sewer's rate should be allowed as payment, *if* it turned out that the landlord was

(a) 4 Bing. 14.

(b) 1 East, 200.

bound to pay that rate, otherwise not. Here, however, there was neither *fraud* nor *condition*, express or implied. The tenant might bonâ fide suppose that he was not bound to pay this species of sewer's rate, and the agreement to allow it as payment was unconditional. Whether the plaintiff could recover back this money, as money paid under a mistake of fact, is a question on which we are not called upon to pronounce any opinion.

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Rule absolute.

CLARK *v.* DIGNUM.

BARSTOW had obtained a rule to shew cause why an attachment for non-payment of costs should not be set aside, on the ground that the costs had not been demanded by the attorney in the cause, but only by a person authorized to receive them for him.

An attachment for non-payment of costs cannot be supported by a demand of the costs by a third person, authorized by the attorney to receive them.

Humfrey shewed cause.—The only case which resembles the present is the case of the attorney's clerk (a), where it was certainly held that an affidavit of a demand by him was not sufficient, without shewing a power of attorney. It has, however, been decided that the real attorney in the cause at the time is the person to demand the costs, though he is not the attorney on the record.

PARKE, B.—The reason why a demand by him is sufficient, is, because payment to him would be payment to his principal. A demand of costs by the attorney himself is sufficient, because he represents the principal for all the purposes of the suit; but he cannot employ another to receive them for him. The rule, *delegatus non potest*

(a) See *Hartly v. Barlow*, 1 Chitty, 229; *Ex parte Fortescue*, 2 Dowl. P. C. 448.

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ALDERSON, B.—If it were not so, there would be nothing to prevent an attorney from employing some creditor of his own to get possession of the money, and thereby render hopeless the client's chance of recovering the money.

Rule absolute.

M'GREGOR and Another v. HORSFALL.

M'GREGOR and Another v. SMITH.

Where two actions were brought by the same plaintiffs against different defendants, on different policies of insurance on the same ship, the Court refused to consolidate them, at the instance of the defendants, without the consent of the plaintiff.

THE above two actions were brought by the same plaintiffs upon two *different* policies of insurance effected with *two different* companies upon the same ship, against the defendants, as chairmen of those respective companies. After the declaration was delivered, the defendant took out a summons to consolidate the actions, which was served on the plaintiff; and after hearing the parties at chambers, Park, J. made the following order:—"I do order, that upon submission of the plaintiffs and the last-named defendant to be bound and concluded by such verdict as shall be found in the first-mentioned action (provided the same shall be to the satisfaction of the judge before whom the same shall be tried), the defendant in the first mentioned action admitting his subscription to the policy in question, by his authorized agents named in the declaration, all further proceedings in the last-mentioned action be stayed." *Cresswell* having obtained a rule to shew cause why this order should not be set aside or amended,

Wightman shewed cause.—It is said, that by this order the plaintiff is bound, without his consent, to try the first-mentioned action, and he insists he has a right to try

which action he pleases. But he does not shew to the Court any reason for wishing to try one action rather than the other; he merely objects to being bound by the one fixed upon. *Doyle v. Anderson* (a) may be cited as an authority that the Court will not in such a case, without the plaintiff's consent, make a consolidation rule upon the terms of the plaintiff and defendant being bound in both actions by the event of one. But that case has been much shaken, if not overruled, by *Hollingsworth v. Broderick* (b). [Parke, B.—The order for consolidation is a favour asked by the defendants. Have you any precedent for binding the plaintiff against his consent?] *Hollingsworth v. Broderick* appears to go to that extent. Two actions having there been brought by the same plaintiff against different defendants, on the same policy of insurance, the Court consolidated them, after a declaration had been delivered in one, and an appearance entered in the other, at the instance of the defendant in the latter action, although the plaintiff objected.

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Cresswell, *contra*.—The plaintiffs have an undeniable right to try which action they please, and ought not to be prevented from exercising that choice, which, by this order, they would in effect be. This is not the case of two actions on the same policy, but of two policies of 2000*l.* each, effected with different companies. A consolidation rule has never been made without consent in cases where the actions were on different policies. The learned Judge had no power to bind the plaintiff, or to order a stay of proceedings in the second action. In *Doyle v. Anderson*, the Court decided that they could not bind the plaintiff without his consent. It is a mistake to suppose that *Hollingsworth v. Broderick* shook that decision. In the latter

(a) 1 Ad. & Ellis, 635; 4 Nev. & Man. 873.

(b) 4 Ad. & Ellis, 646.

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case, there were forty-eight actions brought by the same plaintiff upon the *same* policy, and the decision of the Court amounts only to a recommendation that the consolidation should be made. The plaintiffs are willing to consent to the consolidation rule upon the following terms:—the plaintiffs to select which action they will try, the defendants in the action that is not tried agreeing to be bound by the verdict in the other; the defendant's interest in the policy to be admitted; and, if the defendant in the action which is to be tried pays money into Court, money is also to be paid into Court by the other.

PARKE, B.—We think the plaintiffs cannot be bound in the way proposed by this order; and unless the terms that have been offered are agreed to in a week, the rule for rescinding the order must be made absolute.

Rule accordingly.

BARTON v. RANSON.

A cause and all matters in difference having been referred to arbitration, the arbitrator set out all the facts upon the face of his award, and then awarded that the plain-

DEBT for goods sold and delivered, and on an account stated. Pleas, that the defendant never was indebted, and a set-off for money paid and on an account stated. By an order of Mr. Justice *Patteson*, dated the 8th March, 1836, the cause, and all matters in difference between the parties, were referred to the award, order, and determination

that the plaintiff had no cause of action against the defendant; and stated that he determined the action in favour of the defendant. He then, after awarding by whom the costs of the reference should be paid, concluded as follows:—"But if the Court shall be of opinion, upon the facts hereinbefore stated, that the plaintiff is entitled to recover in the action, then I determine the action in favour of the plaintiff, and order and award that the defendant pay damages to the plaintiff to the amount of one shilling, and also pay to the plaintiff the costs of the reference:"—*Held*, that, the arbitrator having come to a positive finding, and expressly declared his own opinion, the award was sufficiently final, and the latter clause might be rejected.

By the terms of the submission, the arbitrator had power to enlarge the time for making his award; the order of reference, on which there was an indorsement enlarging the time dated previously to the expiration of the time for making the award, was made a rule of Court:—*Held*, that an attachment for non-performance of the award might be moved for without an affidavit that the enlargement was duly made.

of an arbitrator, so that he should make his award on or before the 1st day of Michaelmas Term then next, or such further day as he should appoint, the costs of the suit to abide the event of the award, and the costs of the reference to be in the discretion of the arbitrator. It also gave a power to either of the parties to make the order of reference a rule of court. The arbitrator made his award on the 24th of January, 1837, having enlarged the time for making his award to the 1st day of Trinity Term, 1837, which enlargement he recited in the following words:—"And whereas on the 7th day of October now last, by writing under my hand, I duly enlarged the time for the making of my award until the first day of Trinity Term, then and now ensuing:"—The award then stated—"I find that in or about the month of March, 1835, the plaintiff agreed with the defendant to sell and deliver to the defendant a double acting pump, with metallic piston rod and stuffing box, to deliver 100 gallons of water per minute, when a certain steam-engine of the defendant at Ipswich, in the county of Suffolk, to which it was intended to be fixed, worked thirty strokes in a minute, the length of the stroke in the pump being eighteen inches; that there was no sum agreed upon as the price of the pump, but it was to be from forty to fifty pounds; and I find that such pump was, by the direction of the defendant, to be delivered to a common carrier, at the Galley Quay, in London, for him, and was to be taken from thence at his expense and risk; and I find that about the 14th day of April, 1835, a pump was delivered by the plaintiff at the place aforesaid for the defendant, in performance of the contract, and was received by the defendant at his manufactory at Ipswich on or about the 18th of the same April; and I find that the worth of the pump to the defendant, if it had been made according to the contract, would have been 45*l*.; and I find that the pump was placed by the defendant in his manufactory on its arrival, and was not affixed in the place at which it was intended to work, nor tried or

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used by him until the latter end of the month of July following, when the same having been affixed in its place, was put to work, and did not perform the work stated in the agreement between the parties; and I find that there was no correspondence or communication between the parties after the delivery of the pump to the carrier, until the 2nd of July, 1835, when the plaintiff wrote for payment of the money sought to be recovered in this action; and I find that on the 30th of the same July the defendant, by letter to the plaintiff, informed him that the pump had been set to work on the preceding Wednesday, but did not perform the work required by the contract, and a workman was sent at the defendant's request, by the plaintiff, to inspect the pump, and to see the cause of its failure; and I find that various alterations were made in the pump, but without delivering the quantity of water stated in the contract." He then proceeded: "And I find that the full quantity of 100 gallons of water per minute was necessary to be delivered by the pump for the proper working of the steam engine and the other purposes of the defendant's factory; and I find that as soon as the defendant had, from such trials, ascertained the pump to be imperfect, notice was given to the plaintiff, and he was requested to take it back; and I find that at the time the pump was delivered at the Galley Quay as aforesaid, it was not made in a good and skilful manner, so that it would deliver the quantity of water stated in the contract; and I find that during the time the pump was under trial, the work of the factory was partially carried on, and paper to a small value was manufactured, but that no profit accrued to the defendant from the working of the pump. Now therefore I do order, award, and determine, that, at the commencement of the said action, there was no cause of action by the plaintiff against the defendant, and I determine the said action in favour of the defendant; and I also find there was no cause of set-off by the defendant against the plaintiff, and I determine the plea of set-

off in favour of the plaintiff, and direct that the said action be no further proceeded in." The award, after ordering the costs of the reference to be taxed by the proper officer, to be paid to the defendant, concluded thus:—"But if the Court shall be of opinion, under the circumstances herein-before stated, that the plaintiff is entitled to recover in the said action, then I determine the said action in favour of the plaintiff, and order and award that the defendant shall pay damages to the plaintiff to the amount of one shilling, and shall also pay to the plaintiff, upon demand, the costs of the plaintiff in and about the reference, to be taxed by the proper officer." The order of *Patterson, J.*, with a memorandum indorsed of the enlargement of the time by the arbitrator, of which the following is a copy, had been made a rule of Court:—"I hereby enlarge the time for making my award to the first day of Trinity Term now next. Witness my hand this seventh day of October, 1836."

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Erle having obtained a rule nisi for an attachment against the plaintiff for non-payment of the costs, pursuant to the Master's allocatur and the award,

Kelly, Humfrey, and Petersdorff, shewed cause.—This being a proceeding by attachment for contempt, for not performing the award, it must appear that all the preliminaries, without which the award would not be valid, have been strictly complied with. By the order of reference, the arbitrator is to make his award by a certain day; but he has power to enlarge the time, which he states he has availed himself of. There is, however, no affidavit that the time was enlarged before the original time had expired; and the award, not having been made until January, 1837, was clearly made after the expiration of the original time. In *Davis v. Vass (a)*, it was expressly held, that where an award appeared to have been made out of the

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time originally given to the arbitrator by the rule of Court, which reserved to him the power of enlarging the time, it was not enough, to obtain an attachment, that the arbitrator stated in his award that he had enlarged the time, without verifying the fact by affidavit. 2ndly, This award is not certain or final. The arbitrator has no power given him by the terms of the submission to state the facts for the opinion of the Court, or make a conditional award, or one in the alternative. [*Parke, B.*—If there is an express finding and decision upon the matter referred to him, may not the latter part be rejected as void?] The award must be all taken together. By this award neither of the parties has the benefit contemplated, for the matter is left in uncertainty. The decision amounts to no more than this: in one event, I find for one party; in another event, for the other party. It is to be observed that this is an award made by a legal arbitrator, and the words he has deliberately used cannot be rejected as surplusage. If the submission had expressly given power to the arbitrator to make an award in whichever of two ways this Court, upon a statement of the facts, should be of opinion was right, then this would have been a valid award, and the parties having obtained the opinion of the Court upon it, it might be enforced. But this award is clearly bad, inasmuch as the arbitrator delegates his authority to the Court, which the submission does not empower him to do. 3rdly, Upon the facts stated, this case resembles that of *Milner v. Tucker (a)*, where it was held, that if goods are not supplied conformably to the order given for them, the buyer is bound to return them in a reasonable time, or he will be liable to pay for them. The arbitrator was therefore wrong in the conclusion to which he arrived. [*Parke, B.*—I have no doubt that the award is right upon the facts. The arbitrator finds that the pump would not supply the quantity of water contracted for.]

(a) 1 C. & P. 15.

Erle, *contra*.—First, an affidavit of the due enlargement of the time by the arbitrator is not necessary in this case, as it appears by the rule making the submission a rule of Court, and the indorsement upon that submission, that the enlargement was made before the original time had expired. The rule for the attachment is drawn up upon reading the rule of Court, and the Master's allocatur thereon. [*Parke*, B.—If, before the clause as to the enlargement of time is inserted in the rule of Court, it is necessary that an affidavit should have been produced, the rule would appear to be some evidence of the proper enlargement of the time]. *Dickens v. Jarvis* (a) is expressly in point. There *Bayley*, J., says: "The parties agreed that an enlargement by the arbitrator should be valid. The Court must have credit for not making a rule of Court without a sufficient affidavit." [*Parke*, B.—We must assume that the rule was drawn up on the proper affidavits.] Secondly, the award is final. In *Hindley v. Westmeath* (b), the finding was in the alternative, but the award was held to be good. It must, however, be admitted that this objection was not then raised. (He was then stopped by the Court.)

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PARKE, B.—The only question is, whether the award is final, as the other point has been disposed of. I think that the award is good, and that, as the arbitrator has come to a positive finding, and expressly declared his own opinion, the latter part, in which reference is made to the Court, may be rejected. But as the Court are not all of the same opinion, we will mention this case again tomorrow.

BOLLAND, B.—My present impression is, that this award is bad as not being final; the latter part of the

(a) 5 B. & C. 528.

(b) 6 B. & C. 200; 9 D. & R. 351.

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GURNEY, B.—I am of opinion that the award is good, as there is a positive decision by the arbitrator.

On the following day the case was mentioned again, the Court being full, and Lord *Abinger*, C. B., and *Alderson*, B., expressed their concurrence in the opinion that the award was good, as the arbitrator had declared his own opinion, though the reference to the Court might be void.

Rule absolute.

DOE *d.* MURRELL *v.* MILWARD and Another.

A tenant from year to year, believing that his tenancy determined at Midsummer, gave a written notice to quit at that period, which the landlord accepted, and made no objection to. The tenant having afterwards discovered that his tenancy expired at Christmas, gave his landlord another notice accordingly, and, on possession being demanded at Midsummer, refused to quit the premises. An ejectment having been

EJECTMENT to recover possession of a house and premises at Horsham, in Sussex. The demise was laid on the 27th June, 1837. At the trial before *Littledale*, J., at the last Summer Assizes for the above county, it appeared that the defendants were yearly tenants to the lessor of the plaintiff of the house and premises in question; and being desirous of leaving and going to occupy some premises of their own, in order to determine the tenancy, they gave the lessor of the plaintiff a notice to quit, which was in the following words:—

“Horsham, 23rd December, 1836.

“We hereby give you notice that we intend to give and deliver up the possession of the messuage or tenement we now hold of you at *Midsummer* day next.

“William Milward.

“Robert Milward.”

“To Henry Murrell, Horsham.”

brought:—*Held*, that the tenancy was not determined by notice, inasmuch as it was not good as a notice to quit, and could not operate as a surrender by note in writing within the Statute of Frauds, the first being to take effect in futuro.

The lessor of the plaintiff accepted the notice without making any objection to it, but he gave no assent to it in writing. The tenant of the defendants having refused to quit the premises which they intended to remove to, they felt desirous of continuing in the occupation of the plaintiff's house; and having discovered that their tenancy commenced at Christmas instead of Midsummer, they, previously to Midsummer, gave a fresh notice to quit at the Christmas following. A demand of possession having been made on the expiration of the first notice, the defendants refused to deliver up possession, on the ground that their tenancy expired at Christmas and not at Midsummer, and this ejectment was accordingly brought. It was contended at the trial, on the part of the lessor of the plaintiff, that although the notice might be insufficient as a notice to quit, in case the tenancy expired at Christmas, yet it would operate as a surrender by operation of law of the defendants' interest, it being a note in writing within the meaning of the 3rd section of the Statute of Frauds. The learned Judge left it to the jury to say whether, on the evidence, the tenancy commenced at Midsummer or at Christmas, and the jury found the latter. The learned Judge, however, directed a verdict for the lessor of the plaintiff on the point as to the surrender, but gave the defendants leave to move to enter a nonsuit. *Tyndale* having in Michaelmas Term last obtained a rule accordingly, on the authority of *Johnstone v. Huddlestone* (a),

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Thesiger and *Ogle* now shewed cause.—This is the case of a written notice, which distinguishes it from *Johnstone v. Huddlestone*, where the notice was by parol; and though it may be bad as a notice to quit, from its being given for a wrong period of the year, yet, being in writing, and having been accepted by the landlord, it amounted to a

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surrender by operation of law of the defendants' interest in the land. In *Aldenburgh v. Peaple* (a), *Parke, B.*, said, "the landlord might, if he had chosen, have treated this irregular notice to quit as a surrender, as a term of this kind may be surrendered by a note in writing, but he has not done so." [*Parke, B.*—Is not that case in effect overruled by *Weddall v. Capes* (b)?] There are many cases which might be cited to shew that no particular form of words is necessary to constitute a surrender; all that the Statute of Frauds requires is, that an intention to surrender should be expressed in writing. The third section enacts that "no leases, estates, or interests, either of freehold or terms of years, or any uncertain interest, not being copyhold or customary interest, of, to, or out of any messuages, manors, lands, tenements, or hereditaments, shall be surrendered, unless it be by deed or note in writing, signed by the party so surrendering the same, or his agent thereunto lawfully authorized by writing, or by act and operation of law." In *Farmer v. Rogers* (c), a receipt for the mortgage money on the back of a mortgage deed, was held to amount to a surrender of the term created by the mortgage, which shews that a surrender may be without deed or sealing. Here the words are, "We hereby give you notice that we intend to give and deliver up possession of the messuage or tenement we now hold of you at Midsummer day next." [*Parke, B.*—It is in futuro; there is the difficulty.] It did not require the assent of the lessor at the time; but it contained a proposal which the landlord must be taken to have assented to up to Midsummer day, and it then took effect as a surrender. The tenant had not then any power to assent or dissent. It is clear that the defendants intended to part with their whole interest, and that is sufficient, without using the term "surrender." [*Alderson, B.*—Then there is an offer by

(a) 6 C. & P. 212. (b) 1 M. & W. 50. (c) 2 Wilson, 26.

the tenant to do a thing at a certain day, and when the time comes he changes his mind and refuses to do so.] In *Doe d. Eyre v. Lambly (a)*, where a tenant, on being applied to respecting the commencement of his holding, informed the party that it began on a certain day, and notice to quit on that day was given at a subsequent time, it was held that he was bound by the information he had so given, and was not permitted to shew that in fact the tenancy commenced at a different time. This is a stronger case than that, because here there is a *written* notice to quit, which is not like information which may have been given by the tenant when he was unprepared, but is a deliberate act. The giving of this notice is an admission which binds the tenant, that the tenancy expired at the time mentioned in it. [*Alderson, B.*—In the case cited, Mr. *Garrow* asked Lord *Kenyon* to give an opinion as to what ought to be done. It was rather a statement of facts made on the one side and assented to on the other. If the jury here had found a different verdict, it might possibly have been a more sensible course.] This notice, however, amounted to a clear surrender by operation of law. At all events, there ought to be a new trial and not a nonsuit, as this point was not put distinctly to the jury, and the plaintiff will be concluded by a nonsuit being entered.

Andrews, Serjt., and Tyndale, contra.—There is no authority to shew that a defective notice to quit will operate as a surrender; but *Johnstone v. Huddlestone* appears to be a decision to the contrary. There a tenant gave a parol notice to his landlord, less than six months before his year's holding expired, that he would quit on a certain day, and the landlord accepted and assented to the notice; and it was held that the tenancy was not thereby determined, there not having been either a sufficient no-

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tice to quit, or a surrender in writing, or by operation of law, within the meaning of the Statute of Frauds. There is no distinction, for this purpose, between a parol notice and a written one. It is said that the landlord assented to the notice, but so he did in *Johnstone v. Huddlestone*. The landlord, however, in truth, never did any act to shew his assent to it, until Midsummer-day, when the tenant dissented from it. There was no assent at that time by both parties that it should operate as a surrender; and it could not operate before, being *in futuro*; *Weddall v. Capes* (a). The Court will not grant a new trial, as the case was left fully to the jury, and they found the question as to the tenancy in favour of the defendants.

PARKE, B.—I am very strongly of opinion that there cannot be a surrender to take place *in futuro*. In *Johnstone v. Huddlestone*, it was held that an insufficient notice to quit, accepted by the landlord, did not amount to a surrender by operation of law, and it was there agreed that there could not be a surrender to operate *in futuro*. The case of *Aldeburgh v. Peaple* was much shaken by the decision of this Court in *Weddall v. Capes*; for, although this precise point is not there determined, yet it is clear that the Court were of opinion that the instrument could not operate as a surrender *in futuro*. As to granting a new trial, there appears to have been conflicting evidence as to the time at which the tenancy commenced; but that the jury have determined in favour of the defendant.

ALDERSON, B.—There was evidence to shew that this was a tenancy commencing at Christmas, and the jury have so found. We cannot therefore grant a new trial. The lessor of the plaintiff can bring a fresh ejectment, if he pleases.

The other Barons concurred.

Rule absolute to enter a nonsuit.

(a) 1 M. & W. 50.

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DOE *d.* WAWN *v.* FREDERICK HORN, The Rev. BENJAMIN KENNICOTT, GEORGE BARRAS, and The DURHAM AND SUNDERLAND RAILWAY COMPANY.

EJECTMENT to recover possession of an undivided sixth part of certain houses, land, and premises, situate in the parish of Sunderland, in the county of Durham. At the trial before *Coltman, J.*, at the last Durham assizes, it appeared that the lessor of the plaintiff was tenant in common of the premises in question with the three first-named defendants, who, in the year 1834, had granted a lease of the premises for the term of ninety-nine years to the Durham and Sunderland Railway Company, but without the consent, and against the will, of the lessor of the plaintiff, who gave the Company notice that he was entitled to one-sixth part of the houses, and that he disputed their right to take possession of the property. Upon the lease being granted, the company proceeded to pull down the houses, and construct a rail-road upon their site. The usual special rule had been obtained, admitting the three first-named defendants to defend as landlords. The rule was in the following terms: "Upon the motion of counsel for Frederick Horn, the Rev. Benjamin Kennicott, and George Barras, landlords of the Durham and Sunderland Railway Company, the tenants in possession of the premises in question, &c., it is ordered that the defendants admit the tenancy in common of the plaintiff's lessor with the defendants F. Horn, B. Kennicott, and G. Barras, and that the said F. Horn, B. Kennicott, and G. Barras shall be joined and made defendants with the tenants if they shall appear; and if the

Ejectment by one tenant in common against his three co-tenants in common, and the D. & S. Railway Company, to whom the other three defendants had demised the premises in question. The three co-tenants in common defended as landlords, and the company as tenants. The usual special order had been obtained, admitting the landlords to defend, and to admit ouster in case actual ouster should be proved. It was proved on the trial that rent had formerly been paid to *all* the tenants in common by certain other persons; and there was no evidence to shew that any notice to quit had been given, or that that tenancy had been otherwise determined:—

Held, that the Railway Company, who defended as tenants, were not precluded, by the order admitting the landlords to defend, from insisting that the former tenancy still existed, and therefore that the legal title was not in the lessor of the plaintiff on the day of the demise.

The premises in question (consisting of houses) had been pulled down by the Railway Company, and the rail-road constructed on the site of them. *Semble*, that this was such an occupation as amounted to an actual ouster.

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tenants shall not appear, then that they may be at liberty to appear by themselves; and the said F. Horn, B. Kennicott, and G. Barras, consenting in such case to enter into a rule to confess lease, entry, and also ouster of the nominal plaintiff, in case an actual ouster of the plaintiff's lessor or the tenants in possession shall be proved at the trial, but not otherwise." It was proved at the trial that the houses were pulled completely down, and the Durham and Sunderland Railway constructed upon the site; there was also evidence that, previously to the occupation of the premises by the company, some persons using the style and firm of Horn & Co., but who were different persons from Frederick Horn, had occupied the premises under the tenants in common, and payment of rent by Horn & Co. to all the co-tenants in common was proved. Upon this evidence it was objected for the defendants, first, that a tenancy had been shewn in Horn & Co., and that there was no proof that that tenancy had been determined; secondly, that no actual ouster was proved. The learned Judge, however, refused to nonsuit the plaintiff, and he accordingly obtained a verdict: but leave was given to the defendants to move to enter a nonsuit, if the Court should be of opinion that either of the objections ought to prevail. *Alexander* having, in Michaelmas Term last, obtained a rule accordingly,

Wightman shewed cause.—The first objection is, that upon its appearing in evidence that a tenancy once existed in Horn & Co., it ought to have been shewn that that tenancy had been determined by notice to quit; but even if that were so, it is not competent to these defendants to set up that alleged tenancy as a defence, after having entered into the rule to defend as landlords. That rule states that three of the defendants defend *as landlords*, and the Railway Company as *tenants in possession*. It is not competent to the defendants, after that, to say that a tenancy existed

in third parties, and that they ought to have had notice to quit. In *Doe d. Davies v. Creed* (a), it was held that where a party defended as landlord, the occupiers of the premises having suffered judgment by default, he could not object that the occupiers had not received notice to quit from the lessor of the plaintiff. No doubt that case differs from the present, because there no one defended but the landlord, and the tenants had suffered judgment by default; but this case is the stronger, since here some defend as landlords and others *as tenants in possession to those landlords*. The defendants are setting up the title of third persons with whom they shew no connexion. Mere evidence of payment of rent by these parties, at some prior time, does not make it necessary to shew a notice to quit given to them, unless they come in and defend either as landlords or tenants. The plaintiff finds the defendants in possession adversely as against him, and he brings an ejectment against them, and they cannot set up the former tenancy after the defence they have undertaken by the rule. [*Parke, B.*—'There was at some time a demise to Messrs. Horn & Co., because payment of rent from them to all the co-tenants in common was proved. They may all have taken a wrongful possession as against Messrs. Horn & Co. If there had been no landlords defending, could not the Railway Company have made this objection?'] Possibly so; but not when they defend jointly with the others as landlords. Suppose there had been a demise to Horn & Co., and that that tenancy had been determined by notice to quit, and these three defendants, the tenants in common, had demised wrongfully to the Railway Company; can it be said that they, defending as landlords with these persons, have a right to call upon the lessor of the plaintiff to shew that the former tenancy has been determined regularly by a

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(a) 5 Bing. 327.

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notice to quit? It would be most unreasonable to require it; and yet this is precisely that case. The evidence shews that Messrs. Horn & Co. *were* once tenants to the persons who now defend as landlords; but the rule states that the Railway Company *are now* tenants in possession to the same landlords, which is an admission as against them that the tenancy of Horn & Co. does not exist. It is an estoppel against them to say that there are other persons who are now tenants. It is not meant to be argued that a party defending an ejectment may not set up the right of a third party; but that these persons, defending as landlords to this company, have no right to say that the company are not the tenants, but that other persons are tenants. [*Parke, B.*—The defendants say the legal estate is not in the lessor of the plaintiff. Then, in order to shew that, they prove that Horn & Co. *were* in possession as tenants to them, and that being presumed to be a tenancy from year to year, they contend that you must shew that that tenancy has been determined.] They shew that this tenancy of Horn & Co. has been determined, because, they say, "the Durham and Sunderland Railway Company are now our tenants." They are estopped from saying they are not by the rule: *Roe d. Blair v. Street* (a).

Secondly, the pulling down of the houses, notwithstanding the notice given by the lessor of the plaintiff, and converting the site into a railway, was an actual ouster. Such a case has not hitherto been of frequent occurrence; but it is analogous to the cases where there has been an actual destruction of the property by one of several tenants in common, in which case it has been held that trespass or trover may be maintained. *Fennings v. Lord Grenville* (b), *Brummel v. Jones* (c), *Heath v. Hubbard* (d). The only question is, whether, this being

(a) 4 Nev. & Man. 42; 2 Ad.
& Ellis, 329.

(c) 2 Selw. N. P. 1376.

(d) 4 East, 110.

(b) 1 Taunt. 241.

real property, and not personal, that circumstance makes any substantial difference. The pulling down of the houses, and converting the site into a railway, is literally and strictly an ouster, for the lessor of the plaintiff cannot possibly have his undivided one-sixth part of these houses. An actual ouster is not merely the turning of a person out of possession by force, but the depriving him of the usufruct. Suppose the case of a ship, which three out of four tenants in common had actually destroyed; the other tenant in common would be entitled to maintain trover, although the materials and timber still remained. So here, though the land and soil still exists, yet the subject-matter to be enjoyed, namely, the houses, having been destroyed, and the lessor of the plaintiff deprived of his usufruct, he may maintain ejectment as for an actual ouster.

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Alexander and W. H. Watson, in support of the rule.—The facts shew clearly that Messrs. Horn & Co. were tenants to the co-tenants in common; and unless their title to possession is shewn to have been determined, the lessor of the plaintiff is not entitled to recover. He must make out that he has a legal title to the possession, it having been proved that it was once out of him. The landlord's rule does not shew any determination of the former tenancy. But it is said that that rule estops the parties from alleging that there has been no determination of the tenancy of Horn and Co.; it cannot, however, estop the Railway Company, at least, from setting up such a defence. It was not the common consent rule that was put in, but only the landlord's order, which contains nothing more than an admission that there was a tenancy in common between the plaintiff's lessor and the three first-named defendants, and that the company were the tenants in possession; but they do not admit themselves to be tenants to any particular individuals. [*Parke, B.*—

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The company only admit themselves to be the occupiers.] The Railway Company might, consistently with the terms of the rule, be tenants to Messrs. Horn & Co. If the Company had been the only defendants, it cannot be doubted that they might have set up as a defence that the former tenancy had not been determined. The cases cited do not apply.

Secondly—The question is, whether an actual ouster *in law*, not merely in the popular sense of the word, has been shewn. There was no alteration in the title, no disclaimer, and no ouster in law, though what is shewn to have taken place may have amounted to waste. The case of *Brummel v. Jones*, and the other authorities cited, were cases of the total destruction of the matter itself. There is a clear distinction between the destruction of a chattel and a house—the analogy is not complete—you cannot destroy the land, though you may burn a ship. All the cases shew that an ouster means a turning out of possession, not a mere injury to the property. A writ of waste did not lie by one tenant in common against another. In Co. Lit. 199. b., Lord *Coke* says—“Albeit one tenant in common take the whole profits, the other hath no remedy in law against him, for the taking of the whole profits is *no ejectment* (a); but if he drive out of the land any of the cattle of the other tenant in common, or doth not suffer him to enter or occupy the land, this is an ejectment or expulsion, whereupon he may have an *ejectione firmæ* for the one moiety, and recover damages for the entry, but not for the mesne profits.” So in *Reading’s case* (b), it is said—“One tenant in common may disseise the other; but it must be by actual disseisin, as turning him out, hindering him to enter, &c. But a bare perception of profits is not enough.” So, in *Doe d. Hellings v. Bird* (c), it was held that a demand of possession by one tenant in common, and a

(a) See *Doe d. Fisher v. Prosser*, Cowp. 217.

(b) Salk. 392.

(c) 11 East, 50.

refusal by the other, stating that he claimed the whole, was evidence of an actual ouster of his companion. Those cases are widely different from the present, and shew that to constitute an ouster there must be an actual expelling and putting the party out of possession, or a refusal to let him enter.

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Cur. adv. vult.

The judgment of the Court was afterwards delivered by

PARKE, B.—This was an ejectment brought to recover an undivided sixth of certain land on which two dwelling-houses had stood, but which had been pulled down, and were occupied by the Sunderland Railway Company, who had constructed their railway on the site of the demolished buildings. The lessor of the plaintiff was tenant in common with three of the defendants, who defended as landlords, and the Railway Company were also defendants. It appeared at the trial that rent had been paid by certain other persons, named Horn & Co., for the premises, to all the tenants in common. This was *primâ facie* evidence of a tenancy from year to year, and no evidence to the contrary was given. The usual special rule was obtained for the tenants in common to admit ouster, in case actual ouster should be proved; and the evidence of actual ouster was the pulling down of the dwelling-houses, and the construction of the railway on their site.

Upon these facts two points arose, and were reserved by my Brother *Coltman*—

First, whether the want of a proper determination of Horn & Co.'s tenancy could be insisted upon by the defendants in this action:

Secondly, whether there was any actual ouster of the plaintiff by the defendants, who were tenants in common.

We think that the first of these points is against the plaintiff. If the tenancy in Horn & Co. continued to the

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day of the demise, they would have been the proper lessors of the plaintiff; and it must be taken that it did continue, because there was no proof of its determination by notice to quit, or disclaimer. But it is said that the landlord's rule precluded the defendants, the tenants in common, from raising that question; and the case of *Doe d. Davies v. Creed* (a) was cited as an authority. In that case, the tenants to whom notice to quit ought to have been given, were tenants in possession, and did not defend the action. But the Railway Company are not the tenants entitled to notice, and they defend the action; and as they have only entered into the common rule, to confess lease, entry, and ouster, and their own possession, and no more, they are not precluded, whether the other defendants are or not, from setting up any defence which they may have; and the want of the legal title in the lessor of the plaintiff to the possession on the day of the demise, is a good defence.

This makes it unnecessary to determine the other point; on which, however, it is not improbable that the lessor of the plaintiff would have succeeded; not, perhaps, on the ground of the destruction of the houses, but from the nature of the occupation by a railway company, when the railway is complete and open to the public. Littleton, section 322, says, "that if one tenant in common occupy the whole, and put the other out of possession and occupation, he who is put out of occupation shall have against the other a writ of *ejectione firmæ* of the moiety." And Lord Coke says, in his commentary thereon, "If he drive out of the land any of the cattle of the other tenants in common, or do not suffer them to enter or occupy the land, this is an ejectment or expulsion, wherefore he may have an ejectment for the moiety." And if the peculiar use which the other tenants in common have through the

(a) 5 Bing. 327; 2 Mo. & P. 648.

Railway Company (who must be taken to have acted with their authority, and to claim under them), be such as necessarily to exclude the co-tenant from occupying the land, it seems that it would be as effectual an exclusion as if he had been prevented from entering and occupying by the defendants in person. The rule, however, must be absolute to enter a nonsuit on the first point.

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Rule absolute to enter a nonsuit.

HOLDERNESS v. BARKWORTH and Another.

IN this case a serviceable writ for 50*l.* 10*s.* 10*d.*, debt, and 3*l.* costs, had issued against the defendants, who, upon being served with the writ, paid the amount. The bill of costs, which contained items amounting to 3*l.* 1*s.* 2*d.*, was afterwards taxed under a judge's order, and the Master took off 9*s.* 2*d.* on taxation, being less than one-sixth of the bill. The following items were disallowed in that sum:—three shillings and six-pence for a letter before action, which had not been written; two shillings for service upon one of two partners, which was unnecessary, as the other had been served, and two shillings allowed; and two shillings for making a copy of the same, which was disallowed for the same reason. After taxation, a summons was taken out before a judge at chambers, calling upon the defendant to shew cause why he should not pay to the plaintiff's attorney the costs of taxation, amounting to 1*l.* 16*s.*, under the 2 Geo. 2, c. 23, s. 23, less than one-sixth having been taken off. This summons was attended before *Gurney*, B., at chambers, who made the following order: "That the defendants pay to the plaintiff's attorney costs in this action, less than one-sixth having been taken off on taxation." *Erle* having, on a former day,

Where, upon taxation of costs under 2 Geo. 2, c. 23, s. 23, a less sum than one-sixth of the bill is taken off on taxation, the plaintiff's attorney will not be entitled to the costs of taxation, if he has wilfully inserted any item of charge which he must know ought not to have been charged.

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obtained a rule to shew cause why this order should not be rescinded,

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Platt now shewed cause.—The defendant ought to pay the costs of taxation, as less than a sixth of the bill has been disallowed. The statute 2 Geo. 2, c. 23, s. 23, expressly enacts that, “if the bill taxed be less by a sixth part than the bill delivered, then the attorney or solicitor is to pay the costs of the taxation; but if it shall not be less, the Court, in their discretion, shall charge the attorney or client, in regard to the reasonableness or unreasonableness of such bills.” Now, as the attorney would have had to pay the costs of taxation, if more than a sixth had been taken off, it is only reasonable that he should be paid those costs when less is taken off. [*Parke, B.*—The attorney ought not to put down in his bill one farthing more than he knows he ought to do, or than will be allowed by the Master.] It would be impossible to adhere to such a rule in practice, as it is impossible for the attorney to know what the Master will allow or disallow.

PARKE, B.—It has been held by the Court of Common Pleas, that the statute directing the taxation of costs is not correlative (a). It does not necessarily follow that the defendant is to pay the costs of taxation, though *less* than one-sixth be taken off; although if *more* be disallowed, the plaintiff’s attorney is bound to pay the costs of taxation. The Court have a discretion, which they may exercise according to the reasonableness or unreasonableness of the charges in the bill, whether they will make the defendant pay the costs or not. I have always understood that where the attorney wilfully inserts any item of charge, even one shilling, which he must know ought not to be charged,

(a) *Elwood v. Pearce*, 8 Bing. 83; 1 Moo. & Scott, 159.

he is not entitled to the costs of taxation. There are in this bill some items which the attorney must have known ought not to be charged. If these items had been explained to the learned Judge at chambers, the order would not have been made.

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The rest of the Court concurred.

Rule absolute.

RINGER v. CANN and BARNARD.

THIS was an action of debt for rent on an indenture of demise, brought by the lessor against the defendants as the assignees of John Vince, the lessee.

Plea, that the estate, right, title, interest, and term of years then to come and unexpired, property, profit, claim, and demand whatsoever, of the said John Vince, of and in the demised premises, did not come to or vest in the defendants by assignment thereof legally made, nor did they, the defendants, at any time enter into the demised premises, or any part thereof, or become possessed of the same, or any part thereof, modo et formâ; concluding to the country.

At the trial before *Vaughan, J.*, at the last assizes for the county of Norfolk, it appeared that Vince was lessee of a mill and premises, in respect of which the rent claimed was due, and being in insolvent circumstances, executed a deed of assignment to the defendants, whereby, after reciting that he was indebted to the several parties therein

V., the lessee of a mill and premises at a rack-rent, being in insolvent circumstances, executed an assignment, whereby, after reciting his insolvency, and that he had agreed to assign "all his debts, personal estate, and effects of every description, to C. & B., in trust for the benefit of his creditors," he conveyed and assigned to the said C. & B. all and singular the stock in trade, implements and utensils in trade, corn, grain, hay, horses, carts, and carriages,

crops of every kind, as well severed as not, and personal estate whatsoever of him the said V., in, upon, or about the said mill and premises now in his use or occupation, or elsewhere, &c., (except the wearing apparel of himself and family); and also all debts, securities, writings, &c., and all other the personal estate and effects of him the said V., whatsoever and whosoever, or in or to which he is anywise interested or entitled: habendum, in trust out of the proceeds, first, to pay the costs of the assignment, &c.; secondly, to pay the rent due and in arrear for the said mill and premises, or accruing due until and at and up to the 6th of April then next; and, thirdly, to distribute the residue for the benefit of his creditors:—Held, that the words of the assignment were large enough to comprehend the lease of the mill; and the jury having found that the assignees had accepted the lease, that it passed to them under the assignment.

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was unable to pay, and that he had agreed with the said persons to transfer, assign over, and convey all his debts, personal estate, and effects of every description unto Cann and Barnard (the defendants in this action), upon trust for the benefit of all his creditors; it was witnessed that he, the said John Vince, did convey, assign, transfer, and set over, to the defendants, "all and singular the stock in trade, implements and utensils in trade, corn, grain, hay, horses, carts, and carriages, crops of every kind, *as well severed as not*, household furniture, plate, china, linen, effects, and *personal estate of every description whatsoever* of him, the said John Vince, *in, upon, or about* the dwelling-house, mill, out-houses, and premises situate in Hethersett, then in his use or occupation, or elsewhere soever, or which any person or persons then had in his or their hands, custody, or possession, for or on account of the said John Vince (except the wearing apparel of himself and family). And also all and every the debts, sum, and sums of money in any manner due and owing to the said John Vince from any person or persons whomsoever. And also all bonds, bills, notes, and other securities for money, books of account, writings, and other papers, *and all other the personal estate and effects of him, the said John Vince, whatsoever or wheresoever*, or of, in, or to which he was in anywise interested or entitled, or which any person or persons had in trust for him (except as aforesaid): and all his estate, right, title, and interest of, in, and to the said property, and every or any part thereof: to have, hold, receive, take, and enjoy the said stock in trade, implements and utensils, household furniture, goods, chattels and effects, debts, sums of money, and all other the premises thereby bargained, sold, and assured (except as aforesaid), unto the defendants, their executors, &c., upon trust that they should, as soon as conveniently

could be, collect, receive, sell, dispose of, and convert into money, all the goods, chattels, effects, debts, sum and sums of money, *and all other the personal estate* there-inbefore mentioned: and upon further trust to apply the money which should arise from the sale and disposition of the personal property, personal estate, and effects there-inbefore made saleable, and which should be received, collected, and gotten in, in the first place in payment of the expenses of the assignment, &c., and in the next place in payment of *the rent due and in arrear for the said mill and premises, in the use or occupation of the said John Vince, in Hethersett aforesaid*, or accruing due until and up to the 6th day of April next. And in the next place in trust for distribution amongst the creditors of the said John Vince." It was proved that the premises were held at a rack-rent. On the part of the defendants, it was contended that the lease did not pass to the assignees under the assignment, and that the evidence did not shew an acceptance of it by the defendants. The learned Judge was of opinion that the words of the assignment were large enough to comprehend the lease, and left it to the jury to say whether the defendants had elected to take it, which the jury found they had, and gave a verdict for the plaintiff. *Biggs Andrews*, in Michaelmas Term last, obtained a rule to shew cause why a nonsuit should not be entered, or why there should not be a new trial.

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Kelly now shewed cause.—The question is, whether the assignment contains sufficient words under which the lessee's interest in the lease and premises could pass by it; and it is submitted that it clearly does. He conveys by it all his stock in trade, &c., and *personal estate of every description whatsoever*, upon or about the premises, (except his wearing apparel). Now the rule, *expressio unius exclusio est alterius*, applies here. It may however be said, that as the stock, &c., *on the premises*, is expressly conveyed, and no mention is expressly made of the pre-

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mises themselves, they were not meant to pass by the assignment ; but the subsequent words, "all other the personal estate and effects of him, the said John Vince, whatsoever or wheresoever," are large enough to comprehend every species of personal property to which the insolvent was entitled. It is evident that the intention was that every thing which the debtor possessed should be made available for the benefit of the creditors. The case of *Carter v. Warne (a)* was referred to at the trial, but no question as to the right to repudiate this lease can now arise ; for, admitting the law as there stated by Lord *Tenterden* to be correct, the learned Judge has here left it to the jury whether the assignees had disclaimed or not, and they have found, on the contrary, that they had accepted the lease.

Biggs Andrews and Byles, contra.—It is not sufficient that there are general words large enough to include particular property, for the general words are to be restrained to words ejusdem generis with those which have gone before, and they are to be governed by the context. The intention of the parties here was to raise money for the payment of the debts, and nothing was intended to be conveyed which was not available for the purpose of sale or transfer. Now this was not a valuable lease, being a lease at rack-rent, and could not be made available for such a purpose, and was therefore not intended to pass by the assignment. That the mill was not intended to pass, may be collected from the language of the deed. The property is described to be "*in, upon, or about* the dwelling-house, mill, &c." It is no conveyance of the mill itself, but of the property "*in, upon, or about it.*" So also, it conveys the crops of every kind, "*as well severed as not,*" which would be unnecessary words, if the land on which they grew was intended to be conveyed. That could only

(a) 1 M. & Rob. 479.

have been introduced on the supposition that the lease was not intended to be conveyed. [*Parke, B.*—It extends to crops upon those premises or elsewhere.] Vince had no other land to which those words could apply. There is also a provision that the assignees should pay the rent until and up to the 16th of April next. [*Parke, B.*—That was probably inserted as a protection to the assignees against the creditors, in making such a payment.] The lease would not pass by the general words, because they are restrained by the words which precede them. In *Payler v. Homersham* (a), it was held that the general words of a deed had reference to the previous particular recital, and were to be governed by it. These general words also come after an enumeration of things of an inferior nature to a chattel real; and therefore the latter cannot be intended to have passed by them. In *Doe d. Meyrick v. Meyrick* (b), it was held that a previous particular enumeration in the deed, of certain parts of an estate, confined the operation of the subsequent general words, which would otherwise have been large enough to have passed the whole. So, in *Roberts v. Kuffin* (c), it was held that a devise in express words is not extended by subsequent general words. In *Rawlings v. Jennings* (d), the word “effects” in a will was held to be restrained to articles *ejusdem generis* with those previously specified. If the leasehold estate was intended to pass, it ought to have preceded the description of the other property.

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LORD ABINGER, C. B.—I think the distinction in all these cases is, whether the object of the parties was to pass a limited interest or not; if it was, then the rule is that we are not to construe general words so as to enlarge that limited interest. I believe in every case that has been mentioned,

(a) 4 Mau. & Selw. 423.

(b) 2 Cr. & J. 223.

(c) 2 Atkins, 112.

(d) 13 Ves. 39.

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the object was to pass a particular estate; but such is not the object here. The object of the conveying party here was to make a general assignment of his property over to trustees, in order to pay his creditors. We cannot construe any words in that assignment by looking at what the value of the thing was. Can it be doubted, if this lease was of any value, that the object was to pass the whole?—and here are words which are large enough to pass every thing: we must suppose the object the parties had in view was to pass every thing of value, capable of being turned to account in the hands of the assignees, and I cannot see why the words, which are sufficiently comprehensive to include every thing he had, should not be held to pass the leasehold estate. I do not myself think that the obligation to pay the rent is in favour of the assignees; Vince might have parted with all the personal property before the rent accrued due: I think nothing turns upon that: but, upon the grounds I have stated, I think the learned judge's direction was right.

PARKE, B.—I entirely agree with my Lord Chief Baron in thinking that the learned Judge was right in saying, that, in his opinion, the leasehold estate did pass under the words of this deed. The case turns upon the question, whether the estate passes or not under the general terms used in the assignment. Now let us look to the object of the parties. In *Doe v. Meyrick*, the object of the parties was to pass only a particular estate, and the general words were restricted to meet the obvious intention of the parties. In that case the estate consisted of thirteen acres, where eight acres only by name were specifically granted, and the general words were held not to convey the other five; there the intention of the parties was, as my Lord Chief Baron has observed, to convey a particular thing only. But that is not the case here; here the object of the parties is to convey every

thing valuable, and capable of being turned into cash; that appears from the recitals of the deed itself, which we must take into our consideration, in order to construe the operative words of the clause. The insolvent agrees to transfer to trustees all his debts, personal estate, and effects of every description, upon trust for the benefit of his creditors; and the assignment then goes on to enumerate the personal estate, which is the property, to the trustees, the most valuable; then follow the general words, which cannot be restricted, the object of the parties being to pass all property that might be beneficial to his creditors. With respect to the clause as to payment of the rent, it is not confined to the future, but applies to the bygone rent as well, in respect of the mill and premises; not only to that which had become due, but to that also which was on the eve of becoming due on the 6th of April following; and the provision enables the trustees to pay it, whether they take possession of the property or not. The other words used do not appear to me to be sufficient to control these general words.

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BOLLAND, B.—Looking at the object which the parties to this deed had in contemplation, it appears to me that the limited construction sought to be put upon it by the learned counsel is not the correct one, and that it is clear they intended to pass this property.

Rule discharged.

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CORNER v. SHEW, Executor of C. LEWIS, deceased.

Counts for goods sold to and work and labour done for the defendant, as executor, cannot be joined with a count for money found to be due on an account stated with the defendant, as executor.

Where work is contracted for by a testator, who dies before the contract is completed, but it is completed afterwards; *semble*, that in an action against his executor, the plaintiff should declare specially, stating those facts.

ASSUMPSIT.—The declaration stated that the defendant *as executor*, &c. of Christiana Lewis, deceased, on &c., was indebted to the plaintiff in 20*l.* for goods sold and delivered by the plaintiff to the defendant *as executor* as aforesaid *at his request*: and in 20*l.* for work done, and materials for the same used and provided by the plaintiff *for the defendant as executor* as aforesaid at his request: and in 20*l.* for money paid by the plaintiff *for the use of the defendant as executor* as aforesaid at his request: and in 20*l.* for money found to be due from the defendant *as executor* as aforesaid to the plaintiff, on an account stated between them: and that the defendant, as executor as aforesaid, afterwards and after the death of the said C. Lewis, and before the commencement of this suit, to wit, on &c., promised &c.

Pleas, first, non assumpsit; secondly, ne unques executor.

The cause was tried before the Judge of the Sheriff's Court in London, when the plaintiff recovered a verdict for 14*l.* 11*s.* 6*d.*

Channell, in Michaelmas Term last, moved to arrest the judgment. Referring to the opinions intimated by the Judges in *Ashby v. Ashby* (a), he stated that he should raise no objection to the joinder of the third with the last count; but he submitted that, notwithstanding the words "as executor" in the first and second counts, those counts charged the defendant in his personal character, and could not be joined with the last count, which clearly charged the defendant in his representative character. The case of *Rogers v. Price* (b) might be supposed to have decided

(a) 7 B. & C. 444; 1 Man. & R. 180.

(b) 3 Y. & J. 28.

that a party could be liable *as executor* for work done at his request, for instance, the furnishing, at the request of the executor, the funeral of the testator; but he contended that that case only established that the party sued, being executor, and having assets, was, under the particular circumstances, liable; and if considered as an authority for the position that he was liable as executor, and might be sued in his representative character, that it required further consideration. The Court having granted a rule,

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Platt shewed cause.—The Court will not arrest the judgment if it can imagine any state of facts in which an executor could be liable on each count: *Rose v. Bowler* (a), *Ellis v. Bowen* (b), *Powell v. Graham* (c). [*Parke, B.*—The chief point in those cases was, that the executor could not be liable as executor for goods sold, or for work and labour, except perhaps funeral expenses.] It has been decided that an executor is liable on an implied promise to pay those expenses if there are assets: *Tugwell v. Heyman* (d), *Rogers v. Price* (e). [*Parke, B.*—It is suggested for the defendant that the authority of these cases is doubtful; see *Ashton v. Shearman* (f); and it was questioned in argument in *Lucy v. Walrond* (g).] An executor is liable because he may debit the estate of his testator with those expenses, and he can only take from the estate that for which he is liable as executor. [*Parke, B.*—Can an executor make a fresh contract as executor? *Alderson, B.*—He may stipulate that he will be personally liable, but can he say he will be liable as executor? You cannot bring assumpsit against an executor for money had and received as executor; his saying that he is executor will not make

(a) 1 H. Bl. 108.

(b) Forrest, 98.

(c) 7 Taunt. 580; 1 B. Moore,
305.

(d) 3 Camp. 298.

(e) 3 Y. & J. 28.

(f) Holt, 309.

(g) 3 Bing. N. C. 841.

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him liable in that capacity.] If the testator had money at his banker's at the time of his death, and the executor, doubting his solvency, stipulates only to be liable as far as there were assets, it would be a liability as executor. [*Parke, B.*—The effect of such a stipulation would be, that he personally undertook to pay, not absolutely, but as far as there were assets; but still it is merely a personal undertaking.] Suppose a party contracts with another for work to be done, and before it is done the party dies, is not his executor liable for it when completed after his death? [*Parke, B.*—The executor would be liable, but the declaration should state the contract to have been made with the testator, that at the time of his death the work was incomplete, but was finished afterwards, and that the defendant, as executor, then promised to pay.]

Channell, in support of the rule.—It may be conceded, that if any case can be put in which the defendant would be liable in his representative character upon the first and second counts, the judgment ought not to be arrested. The cases of *Tugwell v. Heyman* and *Rogers v. Price* are relied on by the plaintiff; but, admitting those cases to be law, and that a party, being executor and having assets, might be liable, as upon an implied contract, to pay out of those assets the reasonable expenses of a funeral, ordered with due regard to the testator's station in his lifetime, and to his property and liabilities at the time of his death, it would not follow that the counts in this declaration can be joined. The last count charges the defendant in his representative character, and there is therefore, according to all the authorities, a misjoinder, provided the first and second counts charge the defendant personally. In determining whether they do so charge him, the Court must take notice that the defendant has made the promise stated, and upon the consideration alleged. The promise is, that being indebted to the plaintiff for goods sold and delivered to the defendant at his request, and for

work done at his request, he promised to pay. The circumstance that the counts charge the goods to have been delivered to, and the work done for, and the promise to have been made by him, as executor, is immaterial, for the words "as executor" are surplusage, provided the counts in effect charge the defendant personally; which they clearly do, where not only the promise stated, but the *entire* consideration alleged, must have arisen after the testator's death. It may be different as regards a count for money paid: there, though the payment may be after the death of the testator, the consideration, or part of it at least, may have arisen in his lifetime. [Lord Abinger, C. B.—No doubt, the count for money paid might have been supported by proof of payment by the plaintiff, after the death of the testator, of money, in discharge of some entire joint liability which the plaintiff and the testator had entered into as sureties. Do you contend, that if the defendant, being executor, is liable at all upon an implied contract, then, instead of the first and second counts in the present declaration, there should have been a special count?] If, upon the authority of the cases referred to, the law will imply a promise by an executor having assets, but who has not interfered with the funeral, to pay out of those assets, it should have been declared on specially: it is a promise by the party individually, though to pay out of a particular fund. But whether the law will imply a promise or not, the defendant, as regards the first and second counts in this particular declaration, must be taken to have made a promise rendering himself individually liable; and it is submitted, notwithstanding the observations of some of the Judges in the report of the case of *Rogers v. Price*, that a plea of plene administravit could not be pleaded to the first and second counts; and if that be so, it is decisive to shew that they do not charge the defendant in his representative character. [Lord Abinger, C. B.—Supposing a testator, in his lifetime, to have con-

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tracted with a builder to build a house, and to have died before it was completed, and the builder to have completed the contract after the testator's death, could he not sue the executor, as executor, for the work done in his time, so as to charge the assets of the testator?] He could, upon a special count stating the facts, or so much of them as to shew a contract with the testator, or that the work was done at his request. In the case supposed, the entire cause of action would not arise after the testator's death: an essential part of the contract would be in his lifetime. This case falls within the principle of the decision in *Wigley v. Ashton (a)*. [Parke, B.—In *Marshall v. Broadhurst (b)*, it was held that executors, as such, might recover the value of materials of their testator, which they had worked up to complete a contract made by him with the defendant.] There are certainly cases in which a *plaintiff* has been held entitled to sue in his representative character, on the ground that the money, when recovered, would be assets, where he might equally have sued in his individual character; but no case can be put in which the defendant is equally liable to be sued in his individual character and as executor. In *Rogers v. Price*, it does not appear that the declaration charged the defendant as executor; and, in *Tugwell v. Heyman*, the exact form of it is not given.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—A motion was made in this case in arrest of judgment, and was argued in the course of the last term. The declaration contained four counts in *indebitatus assumpsit*; the first stating the defendant, *as executor*, to be indebted to the plaintiff for goods sold and delivered by

(a) 3 B. & Ald. 101.

(b) 1 Cr. & J. 403.

the plaintiff to the defendant *as executor*; the second, for work and labour performed, and materials supplied to the defendant *as executor*; the third, for money paid for the use of the defendant *as executor*; and the fourth, for money found to be due from the defendant, *as executor*, to the plaintiff, on an account stated; and it was alleged that the defendant, *as executor*, promised to pay. To this declaration there were two pleas,—non assumpsit, and *ne unques executor*; and, on issue joined, a verdict was found for the plaintiff, with general damages. The objection was, that there was a misjoinder of counts; the last being clearly for a debt due from the defendant in his representative character: *Ashby v. Ashby (a)*. The third count was admitted to be for a debt which might be due from the defendant in that character, for which the same case of *Ashby v. Ashby* is an authority; and therefore, that count is not improperly joined with the last.

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But the two first counts, it was contended, must necessarily be for debts due from the defendant *in his own right*, as no goods could be sold to, or work performed for, another, in his representative character. To that it was answered, first, that goods sold for the purpose of a funeral, and the expenses attending it, might be due from the executor as such; and the two cases of *Tugwell v. Heyman*, before Lord *Ellenborough (b)*, and *Rogers v. Price*, in this Court (*c*), were cited as authorities: and, secondly, that if goods were contracted to be sold to the testator, or work agreed to be done for him, and the goods were delivered to, or work completed for, the executor, such demands might be recovered against the executor, in his representative character, under the two first counts.

With respect to the two cases above cited, it was, no doubt, decided by them that there is an implied promise

(a) 7 B. & C. 448.

(b) 3 Camp. 298.

(c) 3 Y. & Jer. 28.

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on the part of an executor, who has assets, to pay the reasonable expense of such a funeral of his testator as is suitable to his degree and circumstances. It was contended, however, at the bar, that those decisions were against a prior authority, and were wrong (a question upon which it is not necessary for us to give any opinion); but that, if they were right, the only point really determined was, that the law implies a contract on the part of the executor *personally*, and not in his *representative character*; and we are all of that opinion.

The implied promise cannot place the defendant in a different condition than if he had made an express contract to the same effect; which certainly would have bound him personally only; and none of the cases contain any authority to the contrary. In *Rogers v. Price*, the report does not give the form of the declaration; it may have been against the defendant in his own right. In *Tugwell v. Heyman*, it seems to have been against the defendants *as executors*; but the question whether the action would lie against them *in that character* was not made, and if it had been made, the answer would have been, that if a defendant could not, under any circumstances, be liable for work and labour done for him as *executor*, those words in the declaration might be struck out as surplusage, which they could not be, in a case in which a defendant could, on any supposition, be liable in that character to the contract declared upon. In a recent case of *Lucy v. Walrond (a)*, in which the declaration was against the defendant *as administrator* for the expenses of a funeral, the point was not discussed, but the case was decided on the ground of the payment of money into Court. We think, therefore, that the two first counts cannot be supported on the ground that an executor, as

(a) 3 Bing. N. C. 841.

such, can be made liable for the funeral expenses of the testator. *Esch. of Pleas,*
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Nor do we think that the plaintiff could have recovered under the two first counts, if the goods, or work and labour, had been contracted for by the testator, and the contract completed by the plaintiff in the time of the executor.

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In one of these counts, the goods are stated to have been *sold to* the defendant; and in the other, the work and labour performed *for him* at his request; and neither of these averments would be true. In order to recover upon this supposed state of things, the counts should have been differently framed.

We are therefore of opinion, that the two first counts are necessarily for debts due from the defendant in his own right; and consequently, that there is a misjoinder, and the rule must be made absolute to arrest the judgment.

Rule absolute.

BOND and Another, (Assignees of GEORGE FOWELL WATTS, a Bankrupt), and PHILIP HENRY WATTS, v. PITTARD.

DEBT for work and labour as the attornies and solicitors of the defendant, and for money paid, and on an account stated. Plea, *nunquam indebitatus*.

At the trial before *Patteson, J.* at the last assizes at Bridgewater, the question was whether the joint action was maintainable, which depended upon whether a legal partnership

A. & B. carried on business together as solicitors in partnership, and held themselves out as such, and the defendant employed them in that capacity. By the agree-

ment under which A. & B. entered into business together, B. was to receive annually *out of the profits* the sum of 300*l.*, but he was not to be in any manner liable to the losses of the business, and was to have a lien on the profits for any losses he might sustain by reason of his liability as a partner:—*Held*, that A. & B. were properly joined as plaintiffs in an action for work and labour, as the money, when recovered, would be the joint property of both until the accounts were ascertained and the division took place.

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subsisted between the two Wattses. It was proved that in the year 1826 they had agreed to become partners, and that they had in various ways held themselves out as partners, and that the defendant had retained them both as his solicitors in a letter addressed to them jointly, and had dealt with them as partners. In order to rebut this case, the defendant put in evidence an answer by Philip Henry Watts to a bill in equity filed by the defendant in this action, which stated "that in the month of February, 1826, he and his brother George Fowell Watts, in the said bill mentioned, who was then carrying on the business of a solicitor and attorney in the city of Bath, verbally agreed to enter into partnership together as solicitors and attornies, and that such business should be carried on by them under the style or firm of Messrs. George Fowell and Philip Henry Watts; and it was further agreed between them, that the profits of their said business should be divided between them in manner following, viz., that he P. H. Watts should, in each and every year, be entitled to receive in the first place *out of such profits* the sum of 300*l.*, which sum was then represented by the said George Fowell Watts to be equal to one-fifth of the then profits of the said business so carried on by the said George Fowell Watts; and accordingly this defendant P. H. Watts saith that the said G. F. Watts and he the said P. H. Watts commenced carrying on such business in partnership together, under the style and firm aforesaid, and always held themselves out to the world, and were treated by their clients as being, as they were in fact, co-partners in such business." The answer also stated, that he the said P. H. Watts was always treated by the said G. F. Watts as, and was in fact, a partner with him in such business, receiving and paying the debts of such business equally with the said G. F. Watts, and entitled to such share in the profits thereof as hereinbefore men-

tioned; but this defendant P. H. Watts *admits it to be true, that as between themselves this defendant was not to be in any manner liable to the losses of the said business*, inasmuch as this defendant was entitled to retain in the first place, and in all events, his said share out of the profits thereof; and it was agreed that this defendant *should have a lien upon the said profits for any losses he might sustain by reason of his liability as a partner*. It also stated that as between him P. H. Watts and his said brother, he was entitled to such share in the profits of the business, as profits, as thereinbefore mentioned; and in case of failure of such profits, he was liable to sustain not only the loss of his share therein, but also losses in respect of his liability as a partner of the firm. The learned Judge told the jury, that to constitute a partnership there ought to be a community of loss as well as profit; that a third party was not concluded by having dealt with them as partners, if it turned out that they were not at the time partners in law for want of a community of profit and loss, and might therefore object to their having been joined as plaintiffs in the action. And he left two questions to the jury; first, was there a community of profit, and secondly, was there a community of loss? The jury found the first question in the affirmative and the second in the negative, and under the direction of the learned judge, the verdict was entered for the defendant, with liberty to the plaintiffs to move to enter a verdict for them, if the Court should be of opinion that his direction was wrong in point of law. *Erle* having, in Michaelmas Term last, obtained a rule accordingly,

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Crowder (and *Barstow* was with him) now shewed cause.—The law, as laid down by the learned judge, was correct; for to constitute a complete partnership, there must be a community both of profit and of loss: *Waugh*

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v. Carver (a), Grace v. Smith (b), Green v. Beesley (c). A community of profits would undoubtedly make them answerable to third parties, but, as between themselves, it would not constitute a partnership, and entitle them to sue jointly. [*Parke, B.*—To whom would this money belong if recovered?—It would belong to both till the end of the year, when the amount of profits would be ascertained, and then in one event 300*l.* would be due to P. H. Watts, and the other would be entitled to the balance.] It is submitted that Philip Henry Watts was in the mere situation of a clerk, with a salary of 300*l.* a year, with a lien on the profits to that amount, in addition to his general remedy against his brother in case of nonpayment. [*Parke, B.*—No: until the net profits are ascertained the money would be the property of both.]

LORD ABINGER, C. B.—It is clear that Philip Henry Watts would not be entitled to the 300*l.* a year, unless there were profits, and the lien upon the profits appears to exclude any other right or remedy in respect of it. Is he not then in some degree liable to the losses? But if not, I think he is a partner in this instance, so far at least as relates to the money recoverable in this action.

PARKE, B.—I have no doubt that this contract could have been entered into by both the Messrs. Watts, whether they were partners or not, and if it were, both would be entitled to sue. If it were entered into by one only, then the question would be, whether the other was jointly interested in the contract. According to the agreement between them, it appears that Philip Henry Watts was to receive 300*l.* a year *out of the profits*, that is, out of the *net profits*, which could not be ascertained until a view was

(a) 2 H. Bl. 235.

(b) 2 W. Bl. 1000.

(c) 2 Bing. N. C. 112; 2 Scott, 164.

taken of the real state of the accounts at the end of the year. But, in the mean time, doubtless the money recovered in this action would be the joint property of both, and would go into the general fund for the benefit of both, until that state of things should arise when a division would take place: and for this reason I am of opinion that in this case the contract is with both. In *Gilpin v. Enderbey* (a), a person who, by a partnership deed, was exempted from all possibility of loss, was held to be a partner, though of an unusual kind, and so considered by the Court in giving judgment.

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BOLLAND, B.—I am of the same opinion. It has been fully established by numerous cases both at law and in equity, that third parties are not affected by the secret contracts, inter se, of persons holding themselves out and contracting as partners. That doctrine is fully gone into in the case of *Waugh v. Carver* (b), by Lord Chief Justice *De Grey*, and is there distinctly laid down.

GURNEY B., concurred.

Rule absolute to enter a verdict for the plaintiff.

(a) 5 B. & Ald. 954.

(b) 2 H. Bl. 246.

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**HARE and Another, Assignees of JONES, a Bankrupt,
v. WARING.**

To assumpsit by assignees of a bankrupt, J., for the non-acceptance of shares in the Great Western Railway, which the bankrupt, before his bankruptcy, had contracted to sell to the defendant, and to convey to him on a day subsequent to the bankruptcy,—the declaration averring that the plaintiffs were the proprietors of the shares, and that they tendered certificates of them to the defendant; the defendant pleaded, first, that J. committed no act of bankruptcy; secondly, that the act of bankruptcy on which

he was declared a bankrupt was unlawfully concerted between J. and the plaintiff, and that he committed no other act of bankruptcy; thirdly, that the plaintiffs were not proprietors of the shares; fourthly, that they did not tender certificates of them to the defendant.

The act of bankruptcy consisted in J.'s having given directions, when in embarrassed circumstances, that he should be denied to all persons; but there was no proof that any person was in fact denied, nor that J. secreted himself. The jury found that the denial was with intent to delay his creditors. *Quære*, whether this was an act of bankruptcy.

Semble, this was not a case in which the depositions were conclusive evidence of the matters contained in them, under the 6 Geo. 4, c. 16, s. 92, inasmuch as the bankrupt could not have fulfilled his contract on the day specified, and therefore this was not a debt or demand for which he could have sustained an action. But even if the case were within that section, *semble*, that evidence might be given to shew that the act of bankruptcy was *concerted*.

In order to prove their proprietorship of the shares, the plaintiffs put in the transfer-book kept by the Great Western Railway Company under the Railway Act, 6 & 7 Will. 4, c. 107, s. 158, in which the plaintiffs were entered as transferees:—*Held*, that this was not sufficient evidence of their title.

The certificates tendered by the plaintiffs to the defendant did not contain the names of the plaintiffs as original proprietors, nor had they any indorsement of transfer to them:—*Held*, that such certificates were insufficient, inasmuch as they did not shew a title in the plaintiffs to convey the shares under the act (ss. 147, 158).

ASSUMPSIT. The declaration stated, that before the bankruptcy of Jones, and after the making of an act of Parliament passed in the session of the fifth and sixth years of William the Fourth, (for making the Great Western Railway), the defendant bargained for and bought of Jones, and Jones then sold to the defendant, 100 shares in the undertaking called the Great Western Railway, to be conveyed to the defendant *on or before* the 31st day of March then next, and to be then paid for by the defendant: and thereupon, in consideration of the premises, and that Jones had then promised the defendant, at his request, that the certificates of the said shares should be delivered, and that the said shares should be conveyed to the defendant, at the time and in the manner aforesaid; the defendant then promised Jones to accept and pay for the same at the time and in the manner aforesaid. The declaration then averred, that after the bankruptcy, and before and at the time specified in the said contract, to wit, on the 31st day of March, 1837, the plaintiffs, so being such assignees as aforesaid, tendered and offered

to the defendant the certificates of 100 shares in the said undertaking, and also offered to the defendant to convey to him the said 100 shares, in the manner and according to the form by the said statute in that behalf provided; they, the said plaintiffs, then being the proprietors of the said 100 shares, and then having a good right and title to convey the same in manner aforesaid. Breach—that the defendant did not accept the certificates or conveyance, nor pay for the shares.

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The defendant pleaded, first, non assumpsit; and also fifteen special pleas, of which the latter only became material on the argument of the case:—

Second—That Jones did not commit any act of bankruptcy whatsoever before the issuing of the fiat.

Third—That the act of bankruptcy upon and under which alone Jones was found and declared to be such bankrupt as aforesaid, was an act of bankruptcy wholly concerted unlawfully between the said Jones and the plaintiff Hare, which said plaintiff was the petitioning creditor; and that Jones did not at any time commit any other act of bankruptcy.

Sixth—That the plaintiffs were not the proprietors of the said 100 shares, or of any of them, nor had they good right and title to convey the same.

Seventh—That the plaintiffs did not tender or offer to the defendant the certificates of the said shares, nor did they offer to convey the said shares, or any of them, in the manner and according to the form by the said statute provided.

The plaintiff took issue on the first, second, sixth, and seventh pleas; and to the third he replied, that the act of bankruptcy upon and under which Jones was found and declared a bankrupt was and is valid in law, and was not nor is concerted; on which replication also issue was joined.

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At the trial before *Tindal*, C. J., at the last Bristol Assizes, the following facts appeared in evidence:—

On the 13th of December, 1836, Jones, the bankrupt, sold to the defendant 100 shares in the Great Western Railway, and the following bought note was thereupon signed by the defendant, and delivered to Jones:—

“Bought through Geo. Edwards, broker, of E. Jones, Esq., 100 shares in the Great Western Railway, at 20*l.* per share prem., *for on or before* the 31st of March next.

“SAML. WARING.”

A corresponding sold note was delivered by the broker to the defendant. On the 13th of January, Jones, whose affairs had become embarrassed, gave directions to his son to deny him to any one who called. There was no proof, however, that any person was actually denied, or that Jones retired to any private part of his house, or in any manner secreted himself. On the 17th, a fiat in bankruptcy issued against him, the plaintiff Hare being the petitioning creditor, under which he was declared a bankrupt, and the plaintiffs were subsequently appointed his assignees. The depositions were put in evidence on the part of the plaintiffs. In the month of March, the plaintiffs bought 100 Great Western Railway shares, with the purpose of transferring or tendering them to the defendant, in performance of Jones's contract. In order to prove their proprietorship of the shares, the plaintiffs put in the Railway Company's register book of transfers, kept in pursuance of the 158th section of the act incorporating the company (6 & 7 Will. 4, c. 107), in which their names were entered as transferees of these 100 shares before and on the 31st of March, 1837; and they proved that the shares were sold by them, on the 7th of April (the defendant having refused to complete the contract) to a third party. In support of the seventh issue, the plaintiffs put in certain certificates of shares, corresponding in the numbers

with those entered in the transfer book, and which were proved to have been tendered to the defendant on the 31st of March, and refused by him. They were in the form required by the 147th section of the act (a), but the name

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(a) The following are the only clauses of the act which it is necessary to state:—

6 & 7 Will. 4, c. 107, s. 3.—“ It shall be lawful for the said company to raise amongst themselves any sum of money for making and maintaining the said railway and other works by this act authorised, not exceeding in the whole the sum of 2,500,000*l.*, the whole to be divided into shares of 100*l.* each, and such shares shall be numbered, beginning with number one, in arithmetical progression, and every such share shall be distinguished by the number to be applied to the same; and the said shares shall be and are hereby vested in the several parties taking the same, and their several and respective successors, executors, administrators, and assigns, to their proper use and benefit, proportionably to the sum they shall severally contribute; and all persons and corporations, and their several and respective successors, executors, administrators, and assigns, who have subscribed or shall severally subscribe for one or more share or shares, or such sum or sums as shall be demanded in lieu thereof towards the said undertaking, and other the purposes of the said subscription, shall be entitled to and receive, in proportionable parts, according to the respective sums so by them

respectively paid, the net profits and advantages which shall arise or accrue from or by the rates, tolls, and other sums of money to be received by the said company, as and when the same shall be divided by the authority of this act.

Sect. 147. “ The said company shall, and they are hereby required, at the first or some subsequent general meeting, and afterwards from time to time as occasion may require, to cause the names of the several corporations, and the names and additions of the several persons who shall then be, or who shall from time to time thereafter become entitled to shares in the said undertaking, with the number of shares with which they are respectively entitled to, and the amount of the subscriptions paid thereon, and also the proper number by which every share shall be distinguished, to be fairly and distinctly entered in a book to be kept by the said company, and after such entry made to cause their common seal to be affixed thereto; and the said company shall from time to time cause a certificate or ticket, with the common seal of the said company affixed thereto, to be delivered to every such *proprietor* on demand, specifying the share or shares to which he is entitled in the said undertaking, such *proprietor* paying to the said com-

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of a party, from whom they had passed through several hands to the plaintiffs, appeared on the face of them as the proprietor, and there was no indorsement of transfer to the bankrupt or to the plaintiffs, as directed by s. 158.

pany the sum of 2s. 6d., and no more, for every such certificate or ticket, and such certificate or ticket shall be admitted in all courts whatsoever as *prima facie* evidence of the title of such respective proprietors, their successors, executors, administrators, and assigns, to the share or shares therein specified, *but the want of such certificate or ticket shall not hinder or prevent the proprietor of any of the said shares from selling or disposing thereof*; and such certificate or ticket may be in the words or to the effect following (that is to say)—

“The Great Western Railway Company.

“Number

“These are to certify that A. B., of _____, is the proprietor of the share (or shares), number _____, of the Great Western Railway Company, subject to the rules, regulations, and orders of the said company. Given under the common seal of the said company, the day of _____, in the year of our Lord, _____.

Sect. 149. “The said company shall, in some proper book to be provided by the said company for that purpose, enter and keep a true account of the places of abode of the several proprietors of the said undertaking, and of the several persons or corporations who shall from time to time become pro-

prietors thereof, or be entitled to any share therein; and every proprietor of the said undertaking (or, in the case of a corporation, the clerk or agent of such corporation duly appointed,) may at all times have recourse to and peruse such book gratis, and may demand and have copies thereof, or of any part thereof, paying at and after the rate of 6d. for every 100 words so copied.

Sect. 157. “That all the shares and proportions of and in the said undertaking or joint-stock or fund of the said company shall to all intents and purposes be deemed personal estate, and be transmissible as such, and shall not be deemed to be of the nature of real property.

Sect. 158. “It shall be lawful for the several proprietors of shares in the said undertaking, and their respective executors, administrators, and successors, to sell and dispose of any shares to which they shall be entitled therein, subject to the rules and conditions herein-mentioned, and the form and conveyance of such shares may be in the following words, or to the like effect, varying the names and descriptions of the contracting parties, as the case may require (that is to say):— I, A. B., of _____, in consideration of the sum of _____, paid to me by C. D., of _____, do hereby assign

The defendant did not, however, make any objection to them on this account, when they were tendered to him.

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A witness called for the plaintiffs stated, in cross-examination, that although, on the face of the contract, the option of delivering the shares *on* or *before* the day specified in the contract, appeared to be, as stated in the declaration, with the seller; yet that, according to the usage in such contracts, those terms were considered to give the option to the buyer, and the defendant might therefore have called upon the bankrupt to complete the sale of the shares at any time *before* the 31st of March (a). Evidence was

and transfer to the said C. D. share, numbered , of and in the undertaking called The Great Western Railway; to hold unto the said C. D., his executors, administrators, and assigns, (or successors and assigns), subject to the several conditions on which I held the same immediately before the execution hereof; and I, the said C. D., do hereby agree to accept and take the said share, subject to the conditions aforesaid. As witness our hands and seals, the day of . And on every such sale the deed or conveyance (being executed by the seller and purchaser) shall be kept by the said company, or by some secretary or clerk of the said company, who shall enter in some book to be kept for that purpose a memorial of such transfer and sale, and indorse the entry of such memorial on such said deed of sale or transfer, for which entry and indorsement the sum of 2s. 6d., and no more, shall be paid to the said company; and the said company, or some secretary or clerk as aforesaid, is hereby required to

make such entry or memorial accordingly, and *on demand* to make an indorsement of such transfer on the back of the certificate of each share so sold, and deliver the same to the purchaser *for his security*, for which indorsement no more than 2s. 6d. shall be paid; and each indorsement, being signed by such secretary or clerk, shall be considered in every respect *the same as a new certificate*; and until such memorial shall have been made and entered as before directed, the seller thereof shall be held and remain liable for all future calls, and the purchaser shall have no part or share of the profits of the said undertaking, nor any interest in respect of such shares paid to him, nor any vote in respect thereof, as a proprietor of the said undertaking."

(a) On the argument, it was contended that this evidence shewed that the contract was misdescribed in the declaration, and that the variance being a material one, could not have been amended; but as it did not ap-

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also given for the purpose of impeaching the bankruptcy, by shewing (under the third plea) that the denial which constituted the alleged act of bankruptcy, had been concerted between the bankrupt and the plaintiff Hare, in order to benefit the general body of creditors by issuing a fiat. This evidence was objected to on the part of the plaintiffs, on the ground that by the 92d section of the Bankrupt Act, 6 Geo. 4, c. 16, the depositions in such a case as the present were conclusive evidence of the act of bankruptcy; and *Fox v. Mahoney* (a) was cited. The learned Judge, however, received the evidence, reserving the question as to its admissibility for the opinion of the Court, and the jury found, on this issue, that the act of bankruptcy *was* concerted. But it was further contended for the defendant, that the mere direction by the bankrupt to deny him, without proof of actual denial, or other evidence of his *keeping house*, was not an act of bankruptcy. The learned Judge left it to the jury to say whether, on the 13th of January, the bankrupt began to keep his house with intent to delay his creditors, and the jury having found that he did, a verdict was taken for the plaintiffs on the second issue. Under his Lordship's direction, a verdict was also entered for the plaintiffs on the first and sixth issues, and for the defendant on the third and seventh; leave being given to the plaintiffs and defendant respectively to move to enter a verdict for each of them, on such of these special pleas (the third, sixth, and seventh,) as the Court should think ought to have been found otherwise.

In Michaelmas Term, cross rules were accordingly obtained, pursuant to the leave reserved, by *Erle* for the plaintiffs, and *Bompas*, Serjt., for the defendant. In

pear, on the report of the learned Judge, that this objection was taken at the trial, the Court refused to entertain it, inasmuch as, if then taken, it might have

been answered by evidence contradicting the alleged usage. See post, p. 375.

(a) 2 C. & J. 325.

the present term, these rules came on to be argued together, by

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Erle, J. Greenwood, and Butt, for the plaintiffs.—I. The first question is, whether a valid act of bankruptcy has been proved to have been committed by the bankrupt Jones. That question involves two points; first, whether the conduct of Jones on the 13th of January amounted in law to an act of bankruptcy,—which arises on the second issue; next, whether, if it did, the legal effect of it was avoided by the finding of the jury that it was concerted between the bankrupt and the plaintiff Hare; and whether evidence of such concert was not excluded by the 92nd section of the Bankrupt Act.

1. The direction given by Jones that he should be generally denied was evidence of a beginning to keep house. That evidence was left to the jury, and they found that he did begin to keep house with intent to delay his creditors. It was entirely a question for the jury *quo animo* the direction was given. The denial itself would be a much more equivocal act than the general direction to deny, which must include creditors as well as other persons. It is directly laid down by *Dallas, C. J.*, and the other Judges of the Court of Common Pleas, in *Lloyd v. Heathcote (a)*, that a general order to deny the party is of itself evidence of a beginning to keep house: the question with what intention that is done is entirely for the determination of the jury.

2. It is difficult to reconcile the finding on the second issue with that on the third. On the former there is a finding that an act of bankruptcy, which must be taken to mean a *valid* act, was committed; on the latter, if it be entered for the defendant, there will appear to be an admission that the act of bankruptcy, on which the fiat was

(a) 2 Brod. & Bing. 388.

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founded, was concerted and void, and there is no suggestion of any other act of bankruptcy: there will therefore be an inconsistency on the record. [*Parke, B.*—No; the finding on the second issue is, that it was an act of bankruptcy which, per se, would be valid; on the third, that it was concerted; there is no inconsistency in that; but the result is, that if a concerted act of bankruptcy is a nullity, the fiat cannot be supported. The only matter in issue on the third plea is, whether the act of bankruptcy which is ear-marked by the proceedings, was concerted. If concert no longer invalidates a commission, then that plea would appear to be bad non obstante veredicto; that is, assuming that the depositions are conclusive evidence.] It was certainly held, in *Marshall v. Barkworth* (a), that notwithstanding the provisions of the 1 & 2 Will. 4, c. 56, s. 42, a concerted act of bankruptcy, by assignment of the trader's effects, still invalidates a commission founded on it, as against the parties to the concert. But inasmuch as the legislature no longer contemplates bankruptcy in the light of a criminal act, as formerly, but on the contrary, has expressly sanctioned the concerting of one particular act of bankruptcy, viz. the filing of a declaration of insolvency, it seems difficult to say that mere concert, not with any fraudulent intention, but with the purpose of benefiting the general body of the creditors, is sufficient to invalidate the bankruptcy. If it be not, the third plea is bad, notwithstanding the finding of the jury on it.

3. But the evidence of concert ought not to have been received, the depositions being in this case conclusive evidence of the act of bankruptcy stated in them. The words of the 6 Geo. 4, c. 16, s. 92 are, that if the bankrupt does not, within two calendar months after the adjudication, give notice of his intention to dispute the commission, &c., "the depositions taken before the commissioners at

(a) 4 B. & Ad. 508; 1 Nev. & M. 279.

the time of or previous to the adjudication of the petitioning creditor's debt, and of the trading *and act or acts of bankruptcy*, shall be conclusive evidence of the matter therein contained, in all actions brought by the assignees *for any debt or demand for which the bankrupt might have sustained any action.*" Now, it is clear that the bankrupt, if no bankruptcy had intervened before the 31st March, might have sued the defendant on this contract: the same cause of action would have vested in him as has vested in the assignees: the bankruptcy does no more than transfer to them the title to sue. The words of the statute are to be construed thus—that if, on the face of the depositions, a valid act of bankruptcy appears, it shall be taken to be conclusively proved for all purposes. It will be said for the defendant, that the depositions are only conclusive evidence of *the facts* stated therein, and do not exclude evidence to take away the effect of those facts by reason of fraud or otherwise; but it is submitted that the true construction is, that on those facts being stated to the jury, they shall be taken to be conclusively proved, and that the adverse party cannot annihilate the effect of them by adding the fact of concert, and so preventing the facts which appear on the evidence from being facts at all for the purposes of the cause. The object of the clause was to prevent debtors to the bankrupt's estate from constantly harassing the assignees by compelling them, on every occasion, to prove the bankruptcy: and the subsequent sections, which enable the debtor to pay the debt into Court when sued by the assignees, and declare that payment to them shall be a discharge although the commission be superseded, render it wholly immaterial to him whether the bankruptcy be valid or not. The authorities are in favour of the plaintiff on this point. In *Young v. Timmins* (a), it was held, that where the petitioning creditor's

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(a) 1 C. & J. 148; 1 Tyrwh. 15.

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debt was proved by the depositions, in a case within the 92nd section, the defendant could not prove that the debt was a fraudulent contrivance between the bankrupt and the petitioning creditor. *Bayley, B.*, says—"The object of the legislature was, that the depositions should be conclusive at the trial, leaving the parties to agitate the merits of the commission elsewhere." [*Parke, B.*—You say that if the depositions shew a valid act of bankruptcy on the face of them, the party cannot destroy the effect of it by evidence to the contrary; and in that you are probably right; but the question is, whether this is a case within the 92nd section—whether it is an action which could have been brought by the bankrupt.] 'The objection will be, that a contract made before the bankruptcy, to be performed after the bankruptcy, is not within the clause. But the only test imposed by the statute is, whether the bankrupt could have sued *if the bankruptcy had not intervened*. *Fox v. Mahoney (a)* is in point on both parts of the argument. That was an action of trover by assignees, to recover the value of goods deposited with the defendant by the bankrupt, and the conversion proved was *after* the bankruptcy; yet it was held that the depositions were conclusive evidence: and Lord *Lyndhurst, C. B.*, said—"I am of opinion that the intention of the legislature was, that, in cases where, *in the event of there being no bankruptcy*, the bankrupt could have maintained an action, and where no such notice as is prescribed in the section has been given, the depositions should be received as conclusive evidence." [*Parke, B.*—The argument on the other side is, that if the commission were now superseded, the bankrupt could not sue on this contract; because he could not sue until he had first done certain acts. It is not the right of action that is transferred to the assignees, but the benefit of the contract on certain things being done, which

(a) 2 C. & J. 325.

things the bankrupt was bound to do. In *Fox v. Mahoney*, *Esch. of Pleas*, 1839. Lord *Lyndhurst* rests his opinion on the ground that if the defendant was not bound to pay the assignees, he was bound to pay the bankrupt; but this is a case in which the defendant must be liable to the assignees alone—he could not be liable to any body else.] *Smith v. Woodward* (a) is a strong case for the plaintiff. There the bankrupt had lent goods to the defendant, with permission to keep them till wanted back, and they were not re-demanded until after the bankruptcy. *Patteson, J.*, held that the 92nd section applied to the case, and thought it was not necessary for that purpose that the demand should have been such as was *perfect* in the bankrupt at the time of his bankruptcy; and he refers to the case of a bill of exchange not due until after the bankruptcy. [*Parke, B.*—This is a different case from that of a bill of exchange—there nothing remains but for the bill to arrive at maturity, and the defendant must pay to one party or another. My observations apply only to the case where an act is to be done *by the party to the contract*, before it can be sued upon.] The learned Judge must there have referred to a case where the holder of the bill must do some act; otherwise it would not have been an analogous case to that under his consideration. *Jones v. Fort* (b), and *Kitchener v. Power* (c), are additional authorities for the plaintiffs. [*Parke, B.*—Where the defendant is at all events liable either to the bankrupt or the assignees, the depositions are evidence: if he is liable only to the assignees, they are not evidence, unless the assignees fully represent the bankrupt. They do not here, because there has been no tender by him; and their acts are not his acts, and their defaults not his defaults.] Such a construction will cause inconvenience and hardship in

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(a) 4 Car. & P. 541.

(b) M. & M. 196.

(c) 3 Ad. & Ell. 232; 4 Nev. & M. 710.

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many cases. It most frequently happens that at the time of the sale of articles to be delivered in futuro, they are not the property of the party who contracts to sell. The principle laid down in the cases is, that where the bankruptcy is an essential ingredient in creating the cause of action, the statute does not apply; but that it is otherwise where the bankruptcy is merely a means of enabling the assignees to sue instead of the bankrupt.

II. There was sufficient evidence of the plaintiff's proprietorship in the shares, and it was not necessary for them to prove the former transfers to themselves from the original proprietors. It was proved that they were registered as the vendees in the book of the company kept under the directions of the act, and that they exercised the most unequivocal act of ownership over the shares, which could be shewn, by selling them to a third party after the tender to the defendant. By the third section of the act, a share is defined to be a liability to calls, and a right to the profits, which arises immediately upon subscription. The proprietorship of the shares may therefore exist without the evidences of it which are provided by subsequent clauses of the act, merely for the greater facility of the sale and transfer of them. [On this point they went into a detailed examination of the several clauses of the act bearing on the subject.]

III. Lastly, the production and tender of certificates was no essential part of the contract, and it was not necessary to prove it; for, by the express words of the 147th section, the want of certificates is not to prevent the proprietor from selling his shares. But if such tender was material, the certificates tendered were sufficient, because the indorsement of transfer to the assignees was a mere formality, which, under sect. 158, could be made at any time on demand, and the defendant could at once have obtained an indorsement of transfer to himself. At all events, no objection having been made to them by the defendant on this ground at the

time of the tender, he waived all such objection. [On this point they referred to the cases relating to the waiver of specific objections to an insufficient tender of money, by the party's insisting only on some other ground of objection.]

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At the conclusion of the argument for the plaintiffs, the case was adjourned to another day; and on its being called on again,

PARKE, B., said—The Court have come to a determination on two of the issues (the 6th and 7th) in favour of the defendant; and this will, perhaps, render it unnecessary for the defendant's counsel to press the case further. [*Bompas*, Serjt., having intimated his acquiescence in this suggestion, his Lordship proceeded]:—Since this case was last before the Court, we have had an opportunity of considering it, and I will now state what the impression of the Court is on the argument already heard, as to each of the material issues. The first question in the case is, whether the issue found for the plaintiff on the plea of non assumpsit ought to be entered for the defendant. It was an action brought on a contract for the sale of shares in the Great Western Railway, stated in the declaration to have been a contract to deliver the shares *on or before* the 31st day of March then next. The conveyance is to come from the plaintiffs; and the rule of law in the construction of such a contract would be, that the option of the time would be with the party who was to do the first act. My brother *Bompas* wished, at the trial, to shew, that according to the usage and custom prevailing in contracts of this kind, the option was with the purchaser; we think, however, that the verdict ought not to be entered for the defendant on this issue, on the ground that the objection was not taken in form at the trial; if it had, the Lord Chief Justice might have amended

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the record, if it was not matter material to the parties. I cannot say, in this case, that this *would* have been an amendment which could have been made, for our present impression is that it is a matter that would have been material; if the option had depended on the defendant, he might have set up a totally different defence; and therefore we are not disposed to think that this is a case where an amendment could be made: but it is quite clear that the objection was not formally taken; if it had, and if the attention of the plaintiff's counsel had been called to it, he would have re-examined the witness, in order to shew there was no prevailing usage to alter the contract in that respect: and the Court, as at present advised, think the verdict ought to stand for the plaintiff on the first issue. Then as to the second issue, which has been found by the jury for the plaintiffs, no point has been reserved by the Lord Chief Justice—he left the question on that issue to the jury; and the objection made to this is, that independently of the act of bankruptcy stated in the depositions, there was no act of bankruptcy proved in the case. The plaintiffs insisted that there was an act of bankruptcy committed on the 13th of January, by an order on the part of the bankrupt to deny him to any one who called; but no person appears to have been denied, nor any thing else done in pursuance of this order; and a mere direction by a bankrupt to be denied, not followed up by shutting up the doors, or retreating to a distant part of the house, is not in itself an act of bankruptcy, and for that there is the authority of the case of *Fisher v. Boucher* (a). That point, however, it is not necessary for us to decide, because the Lord Chief Justice has reserved no power to decide it; and we pronounce no conclusive opinion upon it: the only effect, indeed, of this objection would be, if we thought there was no act of

(a) 10 B. & Cr. 705.

bankruptcy, to have a new trial; but as this matter does not necessarily arise, we pronounce no judgment upon it, though the Court do entertain a strong inclination of opinion, and the authority I have referred to confirms it, that this would not be a good act of bankruptcy. With respect to the question whether the depositions are admissible in this case, it is not necessary on that point to give any opinion: certainly the Court feel considerable doubt whether, in this case, the depositions would be evidence, for this is a case in which the bankrupt could under no circumstances have brought the action. There was evidence against the bankrupt of the contract being rescinded; but independently of that, from the nature of the case itself,—what was necessary for the plaintiffs to prove their own case,—the bankrupt could not maintain any action on this contract. We doubt whether the decision in the Court of King's Bench, in *Smith v. Woodward*, goes so far as to decide that the depositions would be conclusive evidence in the case; but it is not necessary for us to decide that point here. As to the second issue, therefore, the verdict, standing on the former act of bankruptcy, is right. Then as to the third,—the question of the concerted act of bankruptcy,—the Lord Chief Justice was of opinion, that although the depositions might be conclusive evidence of the matters contained in them, and of the facts recited by them, yet that would not exclude the defendant from shewing, that although the facts were true, the plaintiff could not avail himself of the act of bankruptcy, because he was a party to the act of denial which is stated in the depositions; that being collateral to, and quite beside the facts stated in the depositions. At first it occurred to me that the case of *Young v. Timmins* was an authority to the contrary; but on considering the case, I think it is not; for all that was decided was, that the fact there stated, of the bankrupt's being indebted, must be considered as conclusively proved, and that it was not competent

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on the other side to shew that he was not indebted, because the deed was concocted in fraud. In this case, if the act of bankruptcy stated in the depositions was concerted, that was a matter beside all the evidence set forth in the depositions ; and therefore the Court concur with the Lord Chief Justice in thinking that issue was properly found for the defendant. And it is not necessary for us to decide whether the plea be good non obstante veredicto or not, though I am inclined to think, on consideration, that it would be bad, as it does not state what the act of bankruptcy was. There is no doubt that an act of bankruptcy might in some cases be lawfully concerted ; for instance, by a voluntary declaration of insolvency ; nor is there any case which has decided that an act of bankruptcy by lying in prison would not support a commission, even though the petitioning creditor might know it was the intention of the bankrupt to lie in prison. But it is unnecessary here to pronounce any opinion upon that. Then we come to the sixth plea, on which the verdict is for the plaintiffs ; that plea is, that the plaintiffs were not the proprietors of the shares mentioned in the declaration, and had not good right and title to convey them. Now it appears, on looking at the notes of the learned judge, that the only proof really given of the plaintiffs being proprietors was, that their names were inserted in the transfer book of the company as being proprietors ; the Lord Chief Justice thought the book was not evidence to prove the fact, but he directed the verdict to be entered for the plaintiffs, giving leave to move on this point. The question we have to decide on that issue therefore is, whether the book was any evidence of the proprietorship. The act of Parliament does not make it so : it makes the entry in the book essential to complete the title, in order that the transferee should receive the profits, and to exonerate previous parties from the liability to pay ; the act of Parliament requires there should be an entry in a

book, and the only use of that would be to shew that the title of the plaintiffs, if they had any, was complete. We may illustrate the question whether this be evidence of title, by a case of frequent occurrence; when it is essential to a plaintiff to prove that an estate had been conveyed to him in a registered county, would it be enough, without producing the deed of conveyance, to shew that a memorial of the deed had been entered in the register of the county? Clearly not. There is no evidence of title at all, unless this book was evidence, and therefore that sixth issue, which is now entered for the plaintiffs, must be entered for the defendant. Then we come to the seventh plea, by which the defendant denies that the plaintiffs tendered certificates of the shares, or were ready to convey them. Now with respect to so much of this issue as relates to the certificates, we concur with the Lord Chief Justice in thinking that these certificates, in respect of which the tender was made to the defendant, were not proper certificates within the meaning of the allegation in the declaration. The contract is there stated to be a contract on the part of the bankrupt to cause the shares to be conveyed to the defendant on or before the 31st day of March, and it is alleged that the plaintiffs tendered certificates of these shares according to the act of Parliament. What, then, is the meaning of the term *certificate*, and why is it introduced there? We must refer to the act of Parliament to ascertain what the "certificate" means, and the construction which I put on the meaning of the 147th and 158th sections taken together is, that the certificates produced must be certificates shewing the title of *the party who is to convey*, and therefore that the tender ought to have been either of certificates in the names of the assignees themselves, or in the names of the original proprietors, with indorsements upon them of the transfer to the assignees. It is said, however, that this is too strict a

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construction to be put upon the act; that the possession of the certificate is of itself evidence of the right of the party producing it to convey the shares. It may be, if the plaintiffs had produced the certificates of some original proprietor, and then regularly deduced the title from such original proprietor to themselves, that that might have been sufficient, although my present impression is that it would not: here, however, there was no proof of any conveyance from the person in whose name the certificates were, so as to connect that person's name with the assignees. These certificates would be *prima facie* evidence of somebody else, not the assignees, being entitled to the shares, and there is no proof of the assignees deriving the title from that party by assignment, even assuming that to be sufficient. We are satisfied that the true meaning of the contract is, that the party is to convey and deliver certificates, shewing, either on the face of them or from the indorsements, that the title is in the person conveying. We therefore entirely concur with the Lord Chief Justice in thinking that the seventh issue ought to be found for the defendant. That disposes of all the material points in difference in the case.

Judgment for the defendant accordingly.

Bompas, Serjt., *Crowder*, and *Manning*, appeared to argue for the defendant.

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In the Matter of the Estate and Effects of ANNE SAMMON,
deceased.

WADDINGTON had obtained a rule calling upon the executors of Anne Sammon, deceased, to shew cause why they should not deliver to the commissioners of stamps an account of all the legacies and of the property of the said Anne Sammon respectively paid, or to be paid or administered by them as such executors, and why the duties thereon had not been paid, or should not forthwith be paid. This rule was obtained under the 42 Geo. 3, c. 99, s. 2, which provides, that in every case in which any executor or administrator shall not have paid the duties granted and payable upon or in respect of any legacies, or any personal estate, or any share or shares of any personal estate of any persons dying intestate, in pursuance of an act passed in the 36th year of the reign of Geo. 3, or any other act or acts of Parliament relating to duties on legacies or shares of personal estates, within proper and reasonable time, it shall be lawful for his Majesty's Court of Exchequer, upon application to be made for that purpose on behalf of the commissioners appointed for the managing the duties on unstamped vellum, &c., on such affidavit or affidavits as to the said Court may appear to be sufficient, to grant a rule requiring such executor, &c. to shew cause why he, she, or they, should not deliver to the said commissioners an account, upon oath, of all the legacies or of the personal estate respectively paid, or to be paid or administered by him, and why the duties on any such legacies, or any shares or residue of any such personal estate, have not been paid, or should not be forthwith paid, according to law," &c.

The affidavit of the solicitor to the executors, in answer

The pendency of a suit in equity, at the instance of a legatee, praying that an account may be taken of the personal estate and effects of a testator received by the executors, and that the personal estate may be administered, and his legacy paid, is no answer to an application by the commissioners of stamps under the 42 Geo. 3, c. 99, if any duties have become payable on legacies which have been paid, notwithstanding the 36 Geo. 3, c. 52, which provides that the Court in which such suit shall be instituted shall, in giving directions concerning the payment of legacies, take care that no allowance shall be made in respect of any legacy, &c., without due proof of the payment of the duties thereby imposed.

of an executor to deduct the amount of legacy duty on payment of the legacy; and if he omit to do so, he will become personally responsible for it.

It is the duty

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to the rule, stated that the testatrix died in September, 1832, having first made her will, whereby she gave and bequeathed certain pecuniary and specific legacies, and, among others, certain pecuniary legacies to the several charitable institutions in the said will mentioned, which said charitable donations and bequests the said testatrix directed should be paid and satisfied out of her ready money and the proceeds of the sale of her funded property, personal chattels, and effects, and not from the proceeds or by sale of her leasehold or real estate; and she gave and bequeathed unto Sarah Badcock and Mary Simmonds all her leasehold estates situate in the several places therein mentioned, and elsewhere in Great Britain, subject nevertheless to, and charged in addition to her other personal estate with, the payment of her debts, funeral, and testamentary expenses, and of such of her said several pecuniary legacies therein-before particularly mentioned, and not given to charitable uses; and the testatrix thereby bequeathed the residue and remainder of her personal estate and effects, after full payment of her debts and funeral and testamentary expenses, and the legacies therein-before charged upon her leasehold estates, in addition to her other personal estate, unto the said Sarah Badcock and Mary Simmonds. The affidavit also stated that the testatrix, by a codicil to her will, after reciting that the said Mary Simmonds was then dead, gave and bequeathed unto the said Sarah Badcock all the part or share in her leasehold messuages or tenements, and also the furniture and effects, given to the said Mary Simmonds by her said will; that the testatrix made three other codicils to her said will, and thereby gave and bequeathed certain other pecuniary legacies to the several persons therein respectively named; that the will and the several codicils thereto were duly proved by the executors on the 25th September, 1832; that on the 25th of April, 1836, a bill was filed in the Court of Chancery on the behalf of the President, Vice-President, Treasurer, and Members of the Philanthropic

Society (being one of the charitable institutions named in the will of the testatrix, and to whom a legacy of 100*l.* had been thereby bequeathed), against the executors, praying, amongst other things, that an account might be taken, by and under the decree of this Court, of the personal estate and effects of the testatrix received by or for the use of the defendants or either of them, and of the debts, funeral, and testamentary expenses and legacies of the testatrix, and that the personal estate and effects might be applied in due course of administration, and that the plaintiffs might be paid the said legacy of 100*l.* with interest; and that, if necessary, the assets of the testatrix might be marshalled; that by the decree made on the hearing of the cause by the Right Honourable the Master of the Rolls on the 26th November, 1836, it was, amongst other things, ordered that it should be referred to the Master to take an account of the personal estate and effects of the said Ann Sammon the testatrix, which came to the hands of the defendants, her executors, or to the hands of any other person by their order or for their use, in taking which account the Master was to distinguish such personal estate specifically bequeathed, from the same not specifically bequeathed; and it was ordered that the Master should inquire and state to the Court what parts of the personal estate of the said testatrix consisted of leasehold estates and chattels real, or of rents and profits or produce of leasehold estates and chattels real, or other personalty, not being pure personal estate, and what part thereof consisted of pure personalty; and it was also ordered that the Master should also take an account of the debts and funeral expenses and legacies of the testatrix, and compute interest on the debts carrying interest, &c.; and it was ordered that the testatrix's personal estate, not specifically bequeathed, should be applied in payment of her debts and funeral expenses in a due course of administration. It was further stated that the accounts directed to be taken by the said decree were being taken

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before James Farrer, Esq., the Master in rotation to whom this cause stood referred, but that he had not yet made his report.

It was stated in a letter set forth in the affidavit of Mr. Maynard, the solicitor to the executors, which was written by him in answer to an application from the stamp office, "that, upon the death of the testatrix, Sarah Badcock took possession of the title deeds of the leaseholds, and she or her husband (since her death) had received the rents. The unpaid legatees now claim an account of those receipts, and to have the testatrix's real property marshalled, so as to get their legacies discharged. Sarah Badcock appears to have received in cash 200*l*." And in answer to another application, Mr. Maynard said, "All we can say is that Mrs. Badcock was never put into possession of the bequest to her with the assent of the executors. She was living with the testatrix, and upon the death of the latter, she took possession of the leases, and by negligence of the solicitors who then conducted these matters, she was not called upon to account. The executors deny altogether having assented to her having possession, and have raised that point in the pending suit, and the husband of Mrs. Badcock has expressed his readiness to give up the property for payment of the legacies, if the Court should be of opinion that it is liable to them."

Griffith Richards and *Loftus Wigram* shewed cause.—By the statute 42 Geo. 3, c. 99, it is clear that the Court has a discretion as to cases in which they will order an account to be taken, and they will not, in the exercise of that discretion, grant a rule for an account, unless there be a reasonable probability of the executors having to account for something. Now, here there are only two matters upon which the crown can possibly have any claim; one is the sum of 200*l*., the other the leaseholds, on the subject of which there is the suit pending, in which

an account has been ordered before the Master. By the 36 Geo. 3, c. 52, s. 25, it is enacted "that if any suit shall be instituted concerning the administration of the personal estate of any person dying testate or intestate, or any part of such estate, in which any direction shall be given touching the payment of any legacies or legacy of such person, or the residue of his or her personal estate, or any part thereof, the Court wherein such suit shall be instituted shall, in giving directions concerning the same, provide for the due payment of the duties hereby imposed, and in taking any account of any personal estate, or otherwise acting concerning the same, such Court shall take care that no allowance shall be made in respect of any legacy, or part of legacy, or of any residue or part of residue, in any manner whatsoever, without due proof of the payment of the duties hereby imposed." The legislature, therefore, seems to have contemplated the case of the administration of funds under a court of equity, and to have made provision with regard to the duties in that case; and it is well known in practice that the Accountant General will not pay money to any party till the legacy duty receipt is produced to him. The testatrix has here given legacies to certain charitable institutions, and she directs by the will that they shall be paid out of property wholly personal, which, it is apprehended, a court of equity will determine to be property not savouring of realty, such as bonds or mortgages. [The *Attorney General*.—The crown does not pray that the duties shall be paid upon those legacies. *Parke, B.* (to the *Attorney General*).—You call upon them for an account of the duty upon the legacies which they have paid, not waiting for the final decree in the court of equity, for which you may wait for some time. You wish simply to have an account of the legacies which they have paid. The Crown cannot wait until the determination of a Chancery suit. The clause in the 36 Geo. 3, c. 52, does not supersede any

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clause in the 42 Geo. 3, c. 99, which gives the Court power to compel the executors to deliver an account—a more summary mode.] There is here a bequest of leasehold property. [*Parke, B.*—With respect to that, there is a disputable fact, whether that legacy has been paid, discharged, or satisfied, within the meaning of the act which imposes a duty upon that taking place.] That is under the consideration of the Court of Chancery, and forms a portion of the subject of litigation in the suit. Then, with respect to the 200*l.*, it is distinctly sworn that the executors have paid, in discharge of debts due from the testatrix, and in discharge of legacies, upwards of 300*l.* beyond what they have received from the personal estate of the testatrix. The consequence is, that if there were 200*l.* claimed, and they have paid more than 300*l.* beyond what they have received from the personal estate of the testatrix, they would be entitled to a return of the legacy duty; and that being so, the Court would not, in the exercise of its discretion, order an account to be delivered. [*Parke, B.*—The executors ought to have deducted the legacy duty when they paid the legacy. There is no inconvenience in calling upon the executors to account upon oath.] But, until the decree of the Court of Equity is pronounced, it is submitted that the Court will not order an account.

PARKE, B.—This proceeding is collateral to the suit in equity, because all the Crown wants is, not a final account of the estate and effects of the testatrix, but that they should account for the legacies which they have paid. It was the duty of the executors to deduct the legacy duty when they paid the legacy, and if they did not do so, they are made personally responsible. All the Crown wants is an account of what legacies they have paid, and upon these they are bound to pay the duty. That is a different account from the final account of the estate and effects. If what has occurred is equivalent to the satisfaction of the legacy to

Mrs. Badcock, there is a reasonable probability of the executors having to account for some portion of duty.

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Rule absolute, (*with costs*, if any duties should be found due to the Crown (a)).

(a) See *In re Moses Robinson*, 2 M. & W. 407.

HOLME and Another v. GUPPY and Another.

ASSUMPSIT for work and labour, money paid, and on an account stated. The defendants pleaded, first, as to all except 208*l.* 18*s.* 4*d.*, non assumpsit; secondly, as to 200*l.*, other than the 208*l.* 18*s.* 4*d.*, actionem non, because the work and labour was done under an agreement, by which the plaintiffs agreed, in consideration of 1,700*l.*, to build, *within four months and a half after the date of the agreement*, a brewery for the defendants; and in case of default of the plaintiffs in completing the same, they were to forfeit 40*l.* per week for each week the carpenters' and joiners' work was delayed beyond the time specified, the sum forfeited to be deducted from the said sum of 1,700*l.*, as and for liquidated damages. That the carpenters' and joiners' work was not completed within the time agreed, but was delayed for five weeks beyond that time, and that the defendants were entitled to deduct the said sum of 200*l.* accordingly. The defendants pleaded, thirdly, payment into Court of the 208*l.* 18*s.* 4*d.*

The plaintiffs, on the 19th April, 1836, entered into a written contract to build, for the sum of 1,700*l.*, a brewery for the defendants, so far as regarded the carpenters' work, within the space of four months and a half next ensuing the date of the agreement; and in default of completing the same within the time therein-before limited, to forfeit to the defendants 40*l.* per week for each week that the completion of the work should be delayed beyond the 31st August, the amount to

The cause came on to be tried before *Coltman, J.*, at

be deducted from the said sum of 1,700*l.*, as liquidated damages. The plaintiffs did not begin the work for four weeks after the date of the agreement, in consequence of the defendants not being able to give them possession; they were afterwards delayed one week by the default of their own workmen, and four weeks by the default of the masons, &c. employed by the defendants; and the work was not completed till five weeks after the time limited:—*Held*, that the defendants were not entitled to deduct from the 1,700*l.* any sum in respect of the delay, either for the one or the four weeks.

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the Liverpool Summer Assizes, 1837, when it appeared that the work was done under a written contract, dated the 19th of April, 1836, whereby the plaintiff, in consideration of 1,700*l.* to be paid to them by the defendants, agreed that they, the plaintiffs, should within the space of four and a half months next ensuing the date thereof, erect and build for the defendants, in a substantial and workmanlike manner, a brewery, &c., on the east side of Kent-street, Liverpool, so far as respected the carpenters' and joiners' work thereof. And in default of the plaintiffs completing the same at the time thereinbefore mentioned, then they should forfeit and pay to the defendants the sum of 40*l.* per week, for each week the completion of the carpenters' and joiners' work might be delayed *beyond the said 31st day of August, 1836*; the amount to be deducted from the said sum of 1,700*l.*, as and for liquidated damages. After the evidence for the plaintiff had been gone through, it was agreed between the parties, that in consequence of the defendants not being in a condition to give possession till four weeks after the execution of the contract, the contract could not be completed within the time agreed upon; and that of the time which elapsed before the contract was completed, the lapse of one week was occasioned by the default of the plaintiffs, and of four weeks by the default of the masons in the employ of the defendants, who had not got the building ready.

A verdict was thereupon taken for the plaintiffs for 200*l.*, leave being reserved to the defendants to move to reduce the damages to the sum of 160*l.*, or to enter a nonsuit.

Alexander having accordingly obtained a rule nisi to reduce the damages (*a*),

(*a*) The Court refused the rule for a nonsuit, on the ground that it could not have been the intention of the parties that a deduc-

Cresswell and *Crompton* now shewed cause, and contended that the original contract of the plaintiffs clearly was, to complete the work within the specified four months and a half next following the date of the agreement; and that inasmuch as they were excused in law from the performance of that specific contract, by reason of the defendants having prevented the commencement of the work in due time, they were not liable to forfeit any penalty at all for its non-completion.

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Alexander having been heard in support of his rule,

The COURT took time to consider, and a few days afterwards,

PARKE, B. (having stated the facts) said :—On looking into the facts of the case, we think no deduction ought to be allowed to the defendants. It is clear, from the terms of the agreement, that the plaintiffs undertake that they will complete the work in a *given* four months and a half; and the particular time is extremely material, because they probably would not have entered into the contract unless they had had those four months and a half, within which they could work a greater number of hours a day. Then it appears that they were disabled by the act of the defendants from the performance of *that* contract; and there are clear authorities, that if the party be prevented, by the refusal of the other contracting party, from completing the contract within the time limited, he is not liable in law for the default (*a*). It is clear, therefore, that the plaintiffs were excused from performing the agreement contained in the original contract; and

tion should be made in respect of a delay occasioned by the defendants' own agents; and therefore, notwithstanding the apparently unqualified words of the clause,

the four weeks' delay, at all events, incurred no forfeiture.

(*a*) 1 Roll. Abr. 543; Com. Dig. Condition, L. (6).

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there is nothing to shew that they entered into a new contract by which to perform the work in four months and a half, ending at a later period. The plaintiffs were therefore left at large; and consequently they are not to forfeit anything for the delay. The rule must therefore be discharged.

Rule discharged.

BARR v. GIBSON.

By deed-poll, dated 21st October, 1836, the defendant sold and assigned, &c. to the plaintiff "all that ship or vessel called &c., with her masts, tackle, and appurtenances," and covenanted that he had then good right, full power, and lawful authority, to sell and assign the said premises to the plaintiff.

To a declaration on this covenant, assigning as breaches, 1st, that at the time of making the deed-poll, the ship was wholly lost and destroyed, and was incapable of being as-

signed, &c.; 2ndly, that the defendant had not at that time good right, &c. to assign her;—the defendant pleaded, 1st, that the ship was not, at the time of making the deed-poll, wholly lost and destroyed, &c.; and 2ndly, that the defendant had good right, &c. to assign her. It appeared in evidence, that at the time of the sale the ship was on a foreign voyage; that, on the 13th October, she went aground in a storm on the coast of the Prince of Wales's Island, and was left by the crew, who, however, had access to her afterwards; that she lay aground five feet above water on one side, and with her masts standing, till the 24th, when the captain called a survey, and, by the surveyor's advice, sold her; that her bulk ends were strained, but that if there had been facilities at hand, and it had been a different season of the year, she might have been got off and repaired; and that she had sustained no more damage on the 21st October than when she first took the ground:—*Held*, that the covenant of the defendant, that he had power to transfer her as a ship, was not broken.

COVENANT.—The declaration stated, that before the breach of covenant thereafter mentioned, to wit, on the 21st of October, 1836, by a certain deed-poll then made by the defendant, the defendant, in consideration of 4,200*l.*, did fully, freely, and absolutely grant, bargain, sell, assign, and set over unto the plaintiff 64-64th parts or shares of and in all that ship or vessel called the Sarah, of Newcastle, of the burthen of 317 tons, together with all and singular the masts, sails, &c., and appurtenances whatsoever to the said ship or vessel in anywise belonging or appertaining; to have and to hold the said 64-64th parts or shares of and in the said ship or vessel, and all other the said premises, unto the plaintiff, his executors, administrators, and assigns, to his and their own use and uses, and as his and their own proper goods and chattels, from thenceforth for ever; and the defendant did, in and by the said deed-poll, covenant, promise, and agree to and with the plaintiff, that at the time of the sealing and delivery

of the said deed-poll, the defendant had in himself good right, full power, and lawful authority to grant, bargain, sell, assign, and set over the said premises to the plaintiff, in manner and form aforesaid, as by the said deed-poll, relation being thereunto had, might more fully appear; and the plaintiff in fact said, that before and at the time of the making the said deed-poll, the said ship or vessel, with the masts, sails, &c., and appurtenances, was wholly lost and destroyed, and was incapable of being granted, bargained, sold, assigned, or set over, whereof the plaintiff, at the time of making the said deed poll, and paying the said sum of 4,200*l.*, was wholly ignorant; and that the defendant had not, at the time of making the said deed-poll and sealing the same, any power to grant, bargain, sell, assign, or set over the said ship and other the premises to the plaintiff as aforesaid; wherefore the plaintiff said that the defendant had not kept the covenant so made by him with the plaintiff as aforesaid, but had broken the same, and the said plaintiff had not, nor could he have, the possession of the said ship and other the premises aforesaid, but had wholly lost the same, and the said sum of 4,200*l.*, which he so paid as aforesaid, &c.

Pleas—first, that at the time of making the said deed-poll in the declaration mentioned, the said ship or vessel, with the masts, sails, &c., and appurtenances, in the said deed-poll mentioned, was not wholly lost and destroyed, and incapable of being granted, bargained, sold, assigned, or set over, in manner and form as the plaintiff hath alone in his said declaration complained against him. Secondly, that he, the defendant, had, at the time of making the said deed-poll in the declaration mentioned, full power to grant, bargain, sell, assign, and set over the said ship and other the premises in the said deed poll mentioned to the plaintiff, according to the tenor and effect, true intent and meaning, of the said deed-poll. Thirdly, that shortly before the sealing and delivery of the deed-poll in the declaration

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mentioned, the said ship or vessel, with her masts, sails, &c., and appurtenances whatsoever to the same in anywise belonging or appertaining, then respectively the property of the defendant, was upon the high seas, in the prosecution of a certain voyage, with goods and merchandizes on board thereof, to be carried and conveyed on freight; and the defendant further saith, that true it is the said ship or vessel, and the premises in the said deed-poll mentioned, before the sealing and delivery of the said deed-poll, was *lost* on the high seas, and that the plaintiff was then ignorant, and had no reason to believe that the said ship or vessel, and the said premises in the said deed-poll mentioned, were lost; and the defendant further saith, that before and at the time of the sealing and delivery of the said deed-poll, he, the defendant, was ignorant of the loss of the said ship or vessel, or of the said premises in the said deed-poll mentioned, and had no reason to believe that any loss or misfortune had happened to the said ship or vessel, or to the said other premises, &c.; and that at the time of the sealing and delivery of the said deed-poll, the plaintiff and the defendant respectively believed that the said ship or vessel was safely prosecuting the said voyage; and the defendant further saith, that at the time of the sealing and delivery of the said deed-poll, he had in himself good right and full power, and lawful authority to grant, bargain, sell, assign, and set over the said premises in the said deed-poll to the plaintiff, in manner and according to the tenor and effect, true intent and meaning, of the said deed-poll. Verification.

The plaintiff took issue on the two first pleas, and to the last plea replied, that the defendant had not, at the time of the sealing and delivery of the said deed-poll in the declaration mentioned, any power to grant, bargain, sell, assign, or set over the premises in the said deed-poll mentioned to the plaintiff, in manner and form in that plea alleged.

At the trial before *Patteson, J.*, at the last Spring Assizes at Liverpool, it was proved by the captain, that the ship in question, the *Sarah*, sailed from the Shannon on the 11th of September, 1836, on a voyage to Cocagne; that on the 13th of October it blew a gale of wind, and the *Sarah* got aground about a quarter of a mile from the shore of Prince of Wales' Island; that on the 14th of October he, the captain, called a survey, and the surveyors considered that, under the circumstances of the winter season coming on, and the want of facilities and assistance, the ship could not be got off so as to be repaired there, and they recommended that she should be sold as she lay, which was accordingly done on the 24th of October, and it appeared that the hull of the ship only produced 10%. The captain also stated, that the ship had not carried away her masts, and that she was in as good a state on the 21st of October (the date of the bill of sale to the plaintiff,) as on the 13th when she took the ground, the weather in the interval having been fine; that she was lying on the ground on one side, being five or six feet above the water on the upper side, on the other side less. They could see that she was strained, but if there had been facilities at hand, and it had been a different season of the year, she might have been got off. On this evidence, the learned Judge left it to the jury to say whether, at the time the ship was sold to the plaintiff, she was or was not *a ship*, or a mere bundle of timber; and the jury found that she was not a ship; whereupon he directed a verdict to be entered for the plaintiff, with 4,200%. damages, giving the defendant leave to move to enter a nonsuit. *Alexander* having, in Easter Term last, obtained a rule accordingly, for a nonsuit or a new trial,

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Cresswell and *Wightman*, in Trinity Term, shewed cause.—The question in this case must depend upon the issues joined. The question on the first issue will be, whether this vessel was, at the time of the making of the

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deed, wholly lost, and incapable of being transferred : and the material question will be whether she was *a ship* at that time. Now, the evidence is, that at that time the vessel was stranded upon a rock in the Gulf of St. Lawrence, and could not be got off. She was wholly incapable of being transferred for any beneficial purpose. The vendor had then no possession, and never afterwards resumed possession. A party, to be enabled to convey, must have a controlling power over what he conveys. It makes no difference that he knows where the vessel is, if he has no controlling power over her. Suppose the ship had been abandoned and left floating on the high seas, or suppose her to have been taken by pirates, could the owner sell such a vessel, and covenant that he had good right to convey? *Nash v. Ashton (a)* is an authority to shew that a covenant for right to convey extends not only to the title, but to the capacity to grant the estate. There, two husbands being seised in right of their wives as coparceners, they and their wives made a feoffment, and covenanted that they were able to grant the lands: the defendant's wife was within age at the time of the feoffment, and it was held to be a breach of the covenant, as they were not able at the time to grant the estate or make a feoffment. There the estate was in the wife, but she had no capacity to convey. That is like the present case; here the vendor had no power to put the plaintiff in possession of this vessel. Suppose this had been a ship at the bottom of the ocean, and the water being very clear, it could be distinctly seen,—or suppose it at the bottom of a coal mine, would it be a ship that could be conveyed?—The question, again, on the second issue is, whether the defendant had, at the making of the deed-poll, good right, full power, and lawful authority, to grant, bargain, sell, assign, and set over the ship. It is quite clear that he had no power to do that, for he had no power or control

(a) Sir T. Jones, 195; Skinner, 42.

over the vessel. The covenant must mean something more than the power to execute the conveyance; it must mean that the covenantor had power to give possession of the thing conveyed. The question on the third issue is the same as the second, with this difference, that it admits a total loss. The jury were warranted, on the evidence, in coming to the conclusion that this was not "a ship," in the sense of the words contained in the deed. There is no ground either for a nonsuit or a new trial.

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Alexander and W. H. Watson, in support of the rule.—This was such a vessel as could be conveyed; she was at the time remaining in shape a vessel, although so much injured that she could not be got off and made to prosecute her voyage. This case bears an analogy to that of a house burnt down, after a contract has been entered into for the sale of it, but before a conveyance has been entered. In *Paine v. Meller (a)*, where A. had contracted for the purchase of some houses, which were burned down before the conveyance, the loss was holden to fall upon him, although the houses were insured at the time of the agreement of sale, and the vendor permitted the insurance to expire without giving notice to the vendee: Lord Eldon being of opinion that no solid objection could be founded on the mere effect of the accident, because, as the party, by the contract, became in equity the owner of the premises, they were his to all intents and purposes. So, in *Cass v. Rudele (b)*, where A. agreed on behalf of B. to purchase four houses in Jamaica, and to pay 800*l.* for them, and the houses were soon after swallowed up by an earthquake, the Court decreed that A. must pay the purchase money. Again, in *Watkeys v. Delancey (c)*, where premises in New York, sold by the defendant to the plaintiff, had been, before the conveyance, confiscated by an

(a) 6 Ves. 349.

(b) 2 Vern. 280.

(c) 4 Dougl. 354.

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act of the State of New York, this was held not to be a breach of the defendant's covenant that he was lawfully seized in fee. There the party had as little power to give possession of the land as this defendant would have had here, if this ship had been in the deserts of Arabia. When persons are treating for the sale of a ship at a distance, they must be understood to be treating for a ship with all the risks that she was liable to at the time. This conveyance would have given the vendee a power to insure. The policies then existing would pass,—certainly in equity. If the cargo had been taken by the owner of the goods, and he had been liable for freight *pro ratâ itineris*, the vendee would be entitled to such freight. Suppose the vessel had been stranded on a place where she could have been got off, would she not then have been a ship in specie? In *Bell v. Nixon (a)*, a vessel had been driven into a port where there was no dock to receive her, and it appeared that she had suffered so much by sea perils, that upon examination and survey it was judged expedient to break her up, and to sell her for old timber. It was there held, in an action on a policy, that the assured was bound to abandon, before he could call upon the underwriters for a total loss, the ship not being a *wreck*, but, however maimed and damaged, existing in *specie* as a ship. The only extent of the defendant's covenant is, that the legal interest was in him at the time of the conveyance. It does not import that he had then the *control* over the subject-matter of the contract,—although a covenant for quiet enjoyment might. The attempt on the part of the plaintiff is to make the defendant an *insurer*, and the argument would go to this, that the contract would be void if the ship were at the time dismasted or water-logged, so that she could not be managed at sea. In *Nash v. Ashton*, there was a total

(a) Holt's N. P. C. 423.

want of authority to convey. Suppose the vessel had been got off, at whatever expense, would a fresh register have been necessary? There was a total loss, no doubt, *on a contract of indemnity*, but there was no total want of a ship, so as that it was incapable of being transferred by sale. That which is a total loss in a case of insurance is not so on a question of bottomry. In the former case there is a total loss, if by any of the perils insured against the thing insured is rendered of no use, though not totally annihilated; in the latter there must be an *actual* total loss, so that it no longer exists in specie: *Cologan v. London Assurance Company* (a), *Thomson v. Royal Exchange Assurance Company* (b), *Joyce v. Williamson* (c). The effect of the finding of the jury is merely this, that the vessel was not a ship for the purposes of navigation; it is a finding applying to a case of insurance, not to a case of transfer of the property.

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Cur. adv. vult.

In the present term, the judgment of the Court was delivered by

PARKE, B.—This cause was tried before my brother *Patteson*, at the last Liverpool Spring Assizes, when a verdict was found for the plaintiff.

The declaration was in covenant on a deed-poll, dated the 21st of October, 1836, by which the defendant, in consideration of 4,200*l.*, granted, bargained, sold, assigned, and set over to the plaintiff, 64-64ths of the ship *Sarah*, with her masts, tackle, and appurtenances, and the defendant thereby covenanted, that at the time of the sealing and delivery of the deed, he had in himself good right, full power, and lawful authority, to grant, bargain, sell,

(a) 5 M. & Sel. 447.

(b) 1 M. & Sel. 30.

(c) Park Ins. 627.

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assign, and set over the premises to the plaintiff, in manner and form aforesaid; and the declaration states that the vessel was then lost or destroyed, and incapable of being transferred, whereof the plaintiff was then ignorant; and further, that the defendant had not, at the time of the making of the deed-poll, any power to grant, bargain, sell, assign, or set over the ship as aforesaid.

To this declaration, the defendant, treating these two allegations as separate breaches, pleaded, first, that the vessel was not wholly lost and destroyed, and incapable of being transferred; secondly, that he had full power, at the time of the making of the deed, to grant, bargain, sell, assign, and set over; and thirdly, a similar plea, with a special inducement stating the loss of the vessel at the time of the execution of the deed, and the defendant's ignorance of it. Issue was joined on these pleas.

The facts of the case, as they appeared on the trial, were these. The ship, which was on a distant voyage when the assignment was made, had got on shore on the coast of the Prince of Wales's Island, on the 13th of October, 1836, and was left by the crew beating on the shore. The crew had access to her afterwards. On the 14th of October the captain called a survey, and she was sold on the 24th. The ship had sustained no more damage on the 21st than when she first struck. It was proved that if there had been facilities, and a different season of the year, she might have been repaired; and if in England, she might easily have been got off. When on shore, she was five feet above water on one side, on the other not so much; and her bulk-ends were strained. On this evidence, the learned Judge left it to the jury to say, whether "she was *a ship* or not on the 21st of October," and they found she was not: whereupon he directed a verdict for the plaintiff, with 4,200*l.* damages, reserving liberty to the defendant to move to enter a nonsuit. A rule was obtained for that purpose in the following term,

and on shewing cause, the case was very fully discussed, and the Court postponed its judgment. We have now considered the case, and are of opinion that, upon the finding of the jury, the plaintiff is entitled to recover; but we think that, upon the facts stated in the report, the finding was wrong, and there ought to be a new trial.

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The deed, upon which the action is brought, purports to be an absolute transfer, at the time of its execution, of a specified ship, with all the tackle then belonging to it; and by the operation of that deed, all the interest which the vendor had at the time, in that vessel or its tackle, in whatever state they were, passed to the vendee from the moment of the execution of the deed; the execution of the deed itself, without any delivery of the chattel, transferring the property. The question, however, is, not what passed by the deed, but what is the meaning of the covenant contained in it, and whether there has been a breach of that covenant, as alleged in the pleadings.

In the bargain and sale of an existing chattel, by which the property passes, the law does not (in the absence of fraud) imply any warranty of the good quality or condition of the chattel so sold (*a*). The simple bargain and sale, therefore, of the ship does not imply any contract that it is then seaworthy, or in a serviceable condition; and the express covenant that the defendant had full power to bargain and sell in the manner before-mentioned, does not create any further obligation in this respect. But the bargain and sale of chattel, *as being of a particular description*, does imply a contract that the article sold is of *that description*; for which the cases of *Bridge v. Wain* (*b*) and *Shepherd v. Kain* (*c*), and other cases, are authorities; and therefore the sale in this case of *a ship*, implies a

(*a*) *Parkinson v. Lee*, 2 East, 313; Keilw. 91; 1 Roll's Abr., Action sur case (P.), pl. 4, p. 90.

(*b*) 1 Starkie N. P. C. 504.

(*c*) 5 B. & Ald. 240.

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contract that the subject of the transfer did exist in the character of a ship; and the express covenant that the defendant had power to make the bargain and sale of the subject before-mentioned, must operate as an express covenant to the same effect. That covenant, therefore, was broken, if the subject of the transfer had been, at the time of the covenant, physically destroyed, or had ceased to answer the designation of a ship; but if it still bore that character, there was no breach of the covenant in question, although the ship was damaged, unseaworthy, or incapable of being beneficially employed. The contract is for the sale of the subject *absolutely*, and not with reference to collateral circumstances. If it were not so, it might happen that the same identical thing, in the same state of structure, might be a ship in one place, and not in another, according to the local circumstances and conveniences of the place where she might happen to be. If the contracting parties intend to provide for any particular state or condition of the vessel, they should introduce an express stipulation to that effect.

This being the view which, after much consideration, we have taken of the law of this case, it follows that, upon the fact found by the jury, the second issue, at least, must be decided in favour of the plaintiff; for if she was not a *ship* at the time of the execution of the deed, she was incapable of being transferred as such, and therefore the defendant had no power to make the transfer.

The question whether the subject of the transfer bear the character of a ship or not, may, in some extreme cases suggested in the course of the argument, be a question of great nicety and difficulty. In the present case, we do not think such a difficulty exists. We are of opinion, that upon the evidence given on the trial, the ship did continue to be capable of being transferred as such at the time of the conveyance, though she might be totally lost within the meaning of a contract of insurance, (*Thomson v.*

Royal Exchange Assurance Company (a)), which proceeds upon a different principle, and may take place with less of damage to the ship itself than occurred in this case. It proceeds upon the loss of the subject insured for beneficial purposes. Here the subject of the transfer had the form and structure of a ship, although on shore, with the possibility, though not the probability, of being got off. She was still *a ship*, though at the time incapable of being, from the want of local conveniencies and facilities, beneficially employed as such. The covenant, therefore, of the defendant, that he had power to transfer her as a ship, at the time of executing the deed, was not broken. We think that there must be a new trial; and I must add, that every member of the Court concurs in this judgment.

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Rule absolute for a new trial.

(a) 1 M. & Selw. 31.

REGULA GENERALIS.

IT IS ORDERED, that Judges' orders to return writs (whether of mesne or final process), and to bring in the body, be drawn up without any affidavit. Dated this 21st day of February, 1838.

DENMAN,	J. PARKE,
N. C. TINDAL,	J. B. BOSANQUET,
ABINGER,	J. GURNEY,
J. LITLEDALE,	T. COLTMAN.

END OF HILARY TERM.

REPORTS OF CASES
ARGUED AND DETERMINED
IN
The Courts of Exchequer,
AND
Exchequer Chamber.

EASTER TERM, 1 VICTORIÆ.

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MORRELL and Others *v.* FRITH, Clerk.

The following letter from the defendant to the plaintiffs' attorney was held not to be a sufficient acknowledgment of a debt to take the case out of the Statute of Limitations:—

"Since the receipt of your letter, (and indeed for some time previously), I have been in almost daily expectation of being enabled to give a satisfactory reply to your application respecting the demand of Messrs. M. against me. I propose being in Oxford to-morrow, when I will call upon you on the matter."

The construction of a doubtful document, given in evidence to defeat the Statute of Limitations, is for the Court, and not for the jury. If it be explained by extrinsic facts, they are for the consideration of the jury.

ASSUMPSIT for money lent, interest, and on an account stated. Pleas, non assumpsit, and the Statute of Limitations. At the trial before *Gurney, B.*, at the last Oxford Assizes, it appeared that the defendant being indebted to the plaintiffs, who were bankers at Oxford, in a balance of 479*l.*, (which had been due above six years,) the plaintiffs' attorney, in May, 1837, applied to him on their behalf, by letter, requesting him to remit the balance due to them, or if not convenient, to inform him what arrangements he had to propose for the settlement of his account. No answer being given to this application, the plaintiff's attorney, on the 13th of June, again

wrote to the defendant, requesting to know in what way, or at what time, he proposed to pay the balance, or what security he could give for it. On the 28th of July, he received from the defendant the following letter:—

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" 28th July, 1837.

" SIR,

" Since the receipt of your letter, (and indeed for some time previously,) I have been in almost daily expectation of being enabled to give a satisfactory reply to your first application respecting the demand of Messrs. Morrell against me. I propose being in Oxford to morrow morning, when I will call upon you on the matter."

" I am, Sir, &c.

" W. C. FRITH."

It was contended for the plaintiffs, that this letter was a sufficient acknowledgment in writing to take the case out of the Statute of Limitations. The learned Judge was however of opinion that it was not sufficient; and although requested by the plaintiffs' counsel to leave that question to the jury, he declined to do so, and directed a nonsuit.

Ludlow, Serjt., now moved for a rule to shew cause why the nonsuit should not be set aside, and a new trial had.—The letter was a sufficient acknowledgment within the 9 Geo. 4, c. 14; or at all events, the effect of it ought to have been left to the jury for their decision: *Lloyd v. Maund* (a), *Bird v. Gammon* (b). [*Parke*, B.—I have always doubted the correctness of the doctrine laid down in *Lloyd v. Maund*.] That case has never been overruled: and in *Bird v. Gammon*, *Tindal*, C. J., expressly recognises its authority. He says, "The first objection is, that it was left to the jury to say what was the effect of the

(a) 2 T. R. 760.

(b) 3 Bing. N. C. 883.

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letter. But by a chain of cases, from *Lloyd v. Maund to Frost v. Bengough* (a), and others, it appears that such has been the constant course." [Lord Abinger, C. B.—In order to support your case, you ought to cite some authority in which it was held that a document, which the Court thought *did not* raise any acknowledgment, ought to have been left to the jury. In *Bird v. Gammon*, the Judge also had stated his opinion that the letter was a sufficient acknowledgment, and in that opinion the Court concurred.] It may be admitted, that in order to found the argument, the document must appear to be one from which an acknowledgment or promise to pay might fairly be inferred by the jury. But it is not necessary that it should in terms specify the amount or nature of the debt; that may be supplied by extrinsic evidence: *Lechmere v. Fletcher* (b). The letter must therefore be looked at subject to the collateral circumstances by which the existence and identity of the debt were established. It appears to have been written with a prospective intention of giving *satisfaction*, as to a debt of which the writer admits the justice. That could only be paying or giving security for the payment of it. If the jury, on this letter being left to them, had found for the plaintiffs, would the Court have said they had done wrong?

Lord ABINGER, C. B.—I think there is no ground for a rule. This letter contains nothing that can be construed into an acknowledgment of the debt; the utmost that can be made of it is, that it is *evasively worded*, so as to avoid any direct acknowledgment. Then the next question is, whether it ought to have been left to the jury. One case in which the effect of a written document must be left to a jury, is, where it requires *parol evidence* to explain it, as in the ordinary case of mercantile contracts, in which

(a) 1 Bing. 266; 8 Moore, 180.

(b) 1 C. & M. 623.

peculiar terms and abbreviations are employed. So also, where a series of letters form part of the evidence in the cause, they must be left, with the rest of it, to the jury. But where the question arises on the construction of one document only, without reference to any extrinsic evidence to explain it, it is the safest course to adhere to the rule, that the construction of written documents is a question of law for the Court. The *intention of the parties* is a question for the jury, and, in some cases, in cases of libel for instance, the meaning of the document is part of that intention, and therefore must be submitted to the jury. But where a legal right is to be determined from the construction of a written document which either is unambiguous, or of which the ambiguity arises only from the words themselves, that is a question to be decided by the judge. The decision in *Lloyd v. Maund* amounted to no more than this, that the judge was wrong in the interpretation he put upon the letter given in evidence, and therefore he should have left it to the jury. But the construction of written instruments is in the first place for the judge.

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PARKE, B.—I am of the same opinion. I think this letter contains no acknowledgment of a debt simpliciter, and no promise to pay. According to the recent cases, the document, in order to take the case out of the statute, must either contain a promise to pay the debt on request, or an acknowledgment from which such promise is to be inferred. Now, the utmost that can be made of this letter is, that it acknowledges the existence of the debt mentioned in the previous letters; but that the defendant does not mean to express any promise to pay, but reserves it for future consideration. There is certainly no denial of the debt, but it amounts to this only—"though I do not deny it, I do not promise to pay it; whether I will promise, and what species of payment I will make, I re-

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serve for further consideration." There is no acknowledgment simpliciter, but only coupled with this declaration of his intentions. But my brother *Ludlow* says, the letter ought to have been left to the jury, on the authority of *Lloyd v. Maund*. I have always acted on that authority in the case of an obscure and doubtful document, but I have always disapproved it. The course I have taken is, to express my own opinion, and then to take that of the jury, in order that, if they differed with me, the opinion of the Court might be fairly taken on the question whether the document should be left to the jury. But if I am called on to give an opinion, I think the case of *Lloyd v. Maund* is not law. The construction of a doubtful instrument itself is not for the jury, although the facts by which it may be explained are. It is not, however, necessary to decide that point, because my brother *Ludlow* does not ask for a new trial, unless we think this letter such as that the jury might fairly have inferred from it an acknowledgment of the debt; and I am of opinion that it is not.

BOLLAND, B.—I am of the same opinion. I think this letter contains no acknowledgment of the debt, either in law or in fact.

ALDERSON, B.—I agree in the opinion which has been expressed by my Lord and my brother *Parke*, as to the authority of the case of *Lloyd v. Maund*. Where it is a letter only, and there is no evidence beyond the written instrument itself, the construction of it is for the Court only, and not for the jury. The case of mercantile documents is altogether different. There the meaning of the words themselves is in question, being words that are used in a particular and technical sense: it is as if the document were in a foreign language, and the truth or propriety of the translation were in question.

Rule refused.

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WILLIAM MILEHAM v. EICKE.

ASSUMPSIT for money had and received. Plea, non assumpsit. At the trial before *Gurney, B.*, at the Middlesex Sittings after Hilary Term, the following appeared to be the facts of the case. The plaintiff having married a lady possessed of some property in the funds, they employed the defendant, an attorney, to dispose of it; and the following letter, which was sent to the defendant by the plaintiff and his wife as his authority, was put in on the part of the plaintiff:—

“29th March, 1837.

“We do hereby request and authorise you to sell the life interest of the undersigned Anna Maria Mileham (late Finlayson, widow, formerly Pennock, spinster) in and to the sum of —£. three and a half per cent. consols, standing in the name of trustees named in the deed of settlement made on the marriage of the said Anna Maria with Lister Finlayson, at not less than 450*l.*, and out of the proceeds do authorize you to pay off to Mr. C. Brandram the sum of 169*l.*, as a consideration of the transfer or assignment of the mortgage to him from the said L. Finlayson, the same transfer to be made to the undersigned William Mileham. And you are also requested to prepare a settlement of the proceeds and income arising from the London New Price Current, upon the same terms as contained in the draft or intended will of the said L. Finlayson, and also of the said reversionary life interest of the said A. M. Mileham and of the said William Mileham, under the settlement made on the marriage of his father and mother, the interest of the same monies, when received, to be for the wife for life, remainder to the said W. Mileham for his life, (if survivor), and reversion to all the children of the said A. M. Mileham. You will also insert a covenant that W. Mileham shall

The plaintiff having married a lady possessed of funded property, to which she was entitled by the settlement on her marriage with a former husband, they employed the defendant to dispose of it, and out of the proceeds first to pay off a mortgage of the former husband, and to prepare a settlement of the residue, the interest to be secured for the wife for life, with remainder to the plaintiff for life if he survived her, with reversion to her children: the defendant and two other persons to be trustees:—*Held*, that although the defendant had paid over to the plaintiff certain sums out of the proceeds of the sale, (after payment of the mortgage), the plaintiff could not sue him for the residue, as money had and received to his use.

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insure his life in 2,000*l.* in one or more policies, the same to be assigned in trust for the benefit of Mrs. M., or as she shall direct by her will.

“ The trustees to be yourself, Thomas Smethurst, and Henry Harrison.

“ W. MILEHAM,

“ Mr. Eicke.”

“ ANNA MARIA MILEHAM.”

The property was accordingly sold by the defendant for 450*l.*, and the 169*l.* paid over to Brandram, the mortgagee. The defendant had also paid several sums out of the proceeds to the plaintiff, and this action was brought to recover a balance of 159*l.* still remaining in his hands. For the defendant, it was contended, that the terms of the above letter were such as to shew that the plaintiff had no right personally to receive the proceeds of the sale, and therefore could not maintain this action; and the learned Judge, being of that opinion, directed a nonsuit.

Petersdorff now moved for a new trial.—The nonsuit proceeded on the ground, that, under the directions contained in the letter, the proceeds became trust-money to be held for the wife's benefit. But there are no words to shew the creation of a present trust in the wife; the letter amounts only to instructions for a settlement; and, though the wife joins, the property, when converted into money, became by force of law the husband's. And the parties appear to put that construction on the instrument, the defendant having already paid over some sums to the plaintiff out of the proceeds.

PARKE, B.—The nonsuit is quite right. Upon the sale, the property, though converted into a different character, continued to be the property of the wife. It was her property originally; and though the parties may have been

guilty of a breach of trust, a court of equity would treat the defendant as a trustee.

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ALDERSON, B.—It was trust property originally, and the defendant becomes a trustee when the property is converted into money. He receives it upon a bargain that he should hold it on certain terms. It is, in fact, but trust property in the course of conversion into another trust. You seek to intercept it in its progress to the second trust. The answer to the action is, that it never was your money.

Rule refused.

SHACKEL v. RANGER.

PLATT moved for a rule to shew cause why the notice of trial and subsequent proceedings in this cause should not be set aside for irregularity. It was an action on a promissory note, the venue being laid in Gloucestershire. The plaintiff took issue on a special plea, concluding his replication to the country; and instead of demanding a rejoinder, or waiting four days, he delivered the issue, having added the *similiter*, but without any date to it. The issue was delivered in this form, and notice of trial given, on the 19th March, the commission-day at Gloucester being the 31st. The defendant was not under terms to rejoin *gratis* or take short notice of trial. The defendant's attorney returned the issue as irregular, and the defendant not appearing at the trial, a verdict passed for the plaintiff. *Platt* contended that the *similiter* must be considered as a *pleading*, and therefore came within the rule of H. T. 4 Will. 4, requiring that "every pleading," as well as the declaration, shall be entitled of the day of the month and year when pleaded. If the defendant had had the benefit of the four days, the plaintiff would

The rule of H. T. 4 Will. 4, requiring that "every pleading" shall be entitled of the day of the month and year when pleaded, does not apply to a *similiter* added by one party for the other.

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not have been in time to give notice of trial for these assizes. In *Worthington v. Wigley (a)*, the omission to transcribe into the issue delivered the dates of the pleadings, was held to constitute a variance of which the defendant might avail himself after trial.

LORD ABINGER, C. B.—I think there is no reason for giving the date in the case of a similiter. The object of giving the date is, that the other party may know when the pleading was delivered; but where the party files the pleading of the opposite party himself, he must know the date of it.

PARKE, B.—There is no doubt that where the plaintiff adds the similiter, he may give notice of trial forthwith; then the defendant, unless he be under terms, might strike out the similiter and demur. Here all the defendant did was to return the issue. If there be no authority on this point, and we are to decide it for the first time, it is much more reasonable to say that the rule applies only to the case where the party delivers his own pleading, especially as the new rule is only a substitution for the old practice, which required the date of the term only, and formerly, when the similiter was added, no date of the term was required to it.

ALDERSON, B.—It is very reasonable to confine the rule to the case where the party pleading is the party who delivers the pleading.

Rule refused.

(a) 3 Scott, 555; 5 Dowl. P. C. 209.

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COSTER v. WILSON, Bart., and Another.

TRESPASS for assault and false imprisonment. Plea, not guilty. At the trial before *Tindal*, C. J., at the last assizes for the county of Kent, the following appeared to be the facts:—The plaintiff inhabited a house in Short's Alley, Woolwich, which he had taken from a Mr. Curran, at a yearly rent of 10*l.* Curran having died, the property in the premises was contested by two different parties. The plaintiff attorned and paid rent to one of them, and being afterwards distrained upon by the other, (who claimed as the widow and executrix of Curran,) he left the house, and removed away all his furniture. Mrs. Curran thereupon applied to the defendants, who are magistrates for the county of Kent, under the 11 Geo. 2, c. 19, s. 4, for an order on the plaintiff to pay double the value of the goods, as having been fraudulently removed to avoid payment of the rent. The defendants accordingly issued a summons upon the plaintiff, who appeared before them, and evidence having been heard, they adjudged him to pay, as the double value of the goods, the sum of 10*l.* 11*s.* 8*d.*; and the plaintiff having, after notice, refused to pay, and no distress being found on the premises, he was committed by them to Maidstone gaol to hard labour for six months, or until payment of the money. The order of the justices was in the following terms:—"Kent (to wit): Be it remembered, that on the 21st day of March, 1837, at Woolwich, in the county of Kent, Mary Curran, of, &c., came before us, &c., two of her Majesty's justices of the peace in and for the said county, residing near the place whence the goods and chattels hereinafter mentioned were removed, (we or either of us not being interested in the messuage and premises whence the goods and chattels were removed as hereinafter mentioned,) and informed us in writing, that on the

Justices of the Peace have jurisdiction, under the 11 Geo. 2, c. 19, s. 4, to inquire into and adjudicate on an information for the alleged fraudulent removal of goods by a tenant, although it appears that the property in the premises is disputed, and that the tenant has paid the rent to one of the claimants.

A warrant of commitment under the 11 Geo. 2, c. 19, s. 4, did not state that there had been a complaint in writing to the justices, or that the examination of witnesses was upon oath; but it referred to the order of the justices (for payment of double the value of the goods removed), in which those matters were stated:—*Held*, sufficient, and that the justices were not liable in trespass.

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19th day of April then instant, Thomas Coster, late of the parish of Woolwich aforesaid, labourer, unlawfully did fraudulently convey away and carry off from a certain messuage and premises, situate in Short's Alley, in the parish of Woolwich aforesaid, in the said county, whereof the said Thomas Coster had been for some time previous, and was then and there, the tenant by the month, under and from her the said Mary Curran, upon the holding of which said messuage and premises a certain rent (that is to say) the sum of 5*l.* 5*s.* 10*d.* of lawful British money was then and there reserved, due, and payable from the said Thomas Coster to the said Mary Curran, certain goods and chattels of him the said Thomas Coster, to prevent the said Mary Curran from distraining the same for the said sum of money, being such arrears of rent so reserved, due, and payable as aforesaid, the value of such goods and chattels so as aforesaid, conveyed and carried off not exceeding the value of fifty pounds of lawful money of Great Britain, contrary to the form of the statute in such case made and provided; whereupon the said Thomas Coster, after being duly summoned to answer the said charge in the information, appeared on this 12th day of May, in the year of our Lord 1837, at Woolwich aforesaid, before us the said justices, and having heard the charge contained in the said information, declared that he was not guilty of the said offence; whereupon we, the said justices, did proceed to examine into the truth of the charge contained in the said information, and did examine several credible witnesses, being all proper witnesses, upon oath, as to the truth of such charge: and it manifestly appearing to us that the said Thomas Coster is guilty of the said offence charged upon him in the said information, we do hereby determine, declare, and adjudge, that the said Thomas Coster is guilty of the said offence with which he is so charged; and by this our order, under our hands and seals, do declare and adjudge the said Thomas Coster

forthwith to pay to the said Mary Curran, the landlord of the said messuage and premises, the sum of 10*l.* 11*s.* 8*d.* of lawful money of Great Britain, (which we have inquired into and ascertained to be double the value of the said goods and chattels in the said information mentioned,) according to the form of the statute in that case made and provided. Given under our hands and seals this 12th day of May, in the year of our Lord one thousand eight hundred and thirty-seven.

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“ T. M. Wilson (L. S.)

“ J. Webb, (L. S.)”

The warrant of commitment was in the form given in Burn's Justice (title Distress, G.), referring to the order, but not stating on the face of it that there was any complaint in writing, or that the witnesses were examined on oath; and after the plaintiff's commitment, he had been brought up by habeas corpus before *Patteson, J.*, at chambers, and discharged from custody, on the ground that the warrant was defective in these respects. It was now contended for the plaintiff, first, that the defendants had no jurisdiction in the case under the 11 Geo. 2, c. 19, s. 4, it being a question of disputed title to the premises; and, secondly, that the commitment, by reason of the defects above stated, was not sufficient to authorize the imprisonment of the plaintiff. The learned judge, however, was of opinion that the defendants had jurisdiction; and as to the latter objection, that the order was valid, and that the commitment was sufficient, inasmuch as it referred to the order, which was thereby embodied in it: and, under his direction, a verdict was found for the defendants.

Platt now moved for a new trial, on the ground of misdirection. First, the justices had no jurisdiction in this case. They could not try conflicting titles; it is only when there is no doubt who is the landlord in fact, that they

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have authority to adjudicate under the statute. Secondly, the warrant of commitment was essentially bad, for want of any statement of the facts which were necessary, by the express words of the statute, to give the justices jurisdiction, viz., that there was a complaint in writing, and that the witnesses were examined on oath. The order itself is also defective, inasmuch as it does not state *in what manner* the value of the goods, (which must be under 50*l.*), was inquired into and ascertained. The justices are bound, by the terms of the statute, to inquire into the value "in like manner" as they examine into the fact of the fraudulent removal—that is, upon oath; but it is consistent with the order that they did not do so; and unless that be done, the justices might give themselves jurisdiction whatever were the value. [Lord *Abinger*, C. B.—The order states the fact of the value not exceeding 50*l.*, as part of the charge; it then states that they examined all proper witnesses on oath as to the truth of the charge, of which the value of the goods being under 20*l.* is part.] It is rather matter defining the jurisdiction, than part of the charge. [*Parke*, B.—They find that the plaintiff is guilty of removing goods of a value not exceeding 50*l.*, to defraud his landlord.] The inquiry into the value is a distinct matter from the investigation into the facts of the removal.

PER CURIAM.—It is a matter for the determination of the justices whether the removal was *bonâ fide* or fraudulent. It is essential to give them jurisdiction, that the value of the goods should not exceed 50*l.*, that there should be a complaint in writing, and that the examination should be upon oath; all the rest is for their judgment: they may come to a wrong conclusion, but it is matter for their judgment. As to the other objection, the order is perfectly good, and the commitment refers to the order, and therefore incorporates it.

Rule refused.

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BAXTER v. BAILEY.

BALL had obtained a rule to shew cause why the defendant should not be discharged out of custody, on the ground that he had not been charged in execution in due time. The cause was tried at the sittings after Trinity Term, 1837. In the following Michaelmas vacation, the defendant rendered in discharge of his bail, and he was charged in execution at the commencement of the present term.

After a trial in Trinity Vacation, the defendant surrendered in discharge of his bail in Michaelmas Vacation:—*Held*, that the surrender had relation back to the preceding Michaelmas Term; and therefore, by the rule of this Court, Trin. 26 & 27 G. 3, the defendant must be charged in execution in Hilary Term.

Peacock shewed cause.—The question in this case turns upon the construction to be put on the rule of H. T. 2 Will. 4, s. 85, which requires that “the plaintiff shall proceed to trial or final judgment *against a prisoner*, within three terms inclusive after declaration, and shall cause the defendant to be charged in execution within two terms inclusive after such trial or judgment, of which the term *in or after* which the trial was had shall be reckoned one.” The defendant accordingly contends here, that Trinity Term, 1837, counts as one of the two terms, and therefore that he ought to have been charged in execution in Michaelmas Term. But that is not so, as the defendant was not in custody at the time of the trial. The rule applies only from the time when the plaintiff is proceeded against *as a prisoner*.

But, at all events, this rule cannot be made absolute, inasmuch as it is not stated that the plaintiff had notice of the defendant’s intention to surrender, and therefore it was not possible for him to comply with the terms of the rule, supposing the construction of it to be that which the defendant contends for.

Ball, *contra*.—The plaintiff’s affidavit states that the defendant, on the day therein mentioned, rendered *in dis-*

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PARKE, B.—The first point does not depend solely on the rule of H. T. 2 Will. 4, but also on a rule of this Court, Trin. T. 26 & 27 Geo. 2, which directs, that “in case of a surrender in discharge of bail after final judgment obtained, unless the plaintiff shall proceed to cause the defendant to be charged in execution upon the said judgment within two terms next after such surrender, and due notice thereof, (of which two terms the term *wherein* the surrender was made shall be taken to be one,) the prisoner shall be discharged out of custody by supersedeas, unless good cause be shewn to the contrary.” The question then is, whether a surrender in vacation has or has not, for this purpose, a reference to the preceding term: and the case of *Borer v. Baker* (a) decides that it has. The defendant ought, therefore, to have been charged in execution in Hilary Term. As to the other point, I think the statement which has been referred to in the plaintiff’s affidavit, sufficiently shews that he had notice of the render.

The rest of the Court concurred.

Rule absolute.

(a) 2 Dowl. P. C. 608.

HOLLINGDALE v. LLOYD.

A married woman will be discharged from arrest on entering a common appearance, unless the plaintiff swears that when he gave her credit, she represented herself to be a *feme sole*.

HEATON obtained a rule to shew cause why the bail-bond given by the defendant in this cause should not be set aside on entering a common appearance, upon affidavits stating that the defendant was arrested on the 11th of April, for the amount of a bill of exchange for 30*l.*, dated 1st May, 1837, drawn by the plaintiff on and accepted by the defendant; and that the defendant,

at the time she gave the bill, informed the plaintiff that she was a married woman, living with her husband: and setting forth a copy of the certificate of her marriage.

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Cleasby shewed cause on an affidavit of the plaintiff, which stated that the defendant, at various times in the years 1836 and 1837, obtained goods and money of him to the amount of 30*l.*, for which she ultimately gave the bill of exchange on which the action was brought; that she did not, when she obtained the goods and money, or gave the bill, or at any other time until after her arrest, inform the deponent that she was a married woman, living with her husband, or that she had any husband; but, on the contrary, stated that a Mr. Hazard was her guardian, and that she possessed houses and other property at Gravesend; that on the 25th of April, 1837, she gave the deponent an order on one of *her* tenants at Gravesend, in her handwriting, to pay him 1*l.* on her account, but which the tenant declined to pay, in consequence of the defendant's having given previous orders, which had anticipated the amount of rent due to her; that the defendant, while living at Gravesend and in the neighbourhood, for nearly twelve months, was not living with any husband, or any person passing as such, or known to the deponent as a married woman, or as being visited or protected as such.

Cleasby contended that the defendant was not entitled to be discharged on motion, inasmuch as the plaintiff was not informed by her, when he gave her credit, that she was a married woman; and cited *Slater v. Mills* (a).

PARKE, B.—It is the uniform rule that the Court discharges a married woman on filing a common appearance,

(a) 7 Bing. 606; 5 Moo. & P. 603; 1 Dowl. P. C. 230.

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The other Barons concurring,

Rule absolute, without costs.

WEST v. SMALLWOOD.

Where a party lays a complaint before a magistrate on a subject-matter over which he has a general jurisdiction, and the magistrate grants a warrant, upon which the party charged is arrested, the party laying the complaint is not liable as a trespasser, although the particular case be one in which the magistrate had no authority to act.

The complainant having accompanied the constable charged with the execution of the warrant, and pointed out to him the person to be arrested:—*Held*, that this was evidence to go to the jury of a participation in the arrest.

TRESPASS for assault and false imprisonment. Plea—the general issue.

At the trial before Lord *Abinger*, C. B., at the Middlesex Sittings after Hilary Term, it appeared that the plaintiff was a builder, and had been employed by the defendant to build some houses for him under a specific contract. Whilst the work was going on, a dispute arose between the plaintiff and defendant, and the plaintiff in consequence discontinued the work, upon which the defendant went before a magistrate, and laid an information against him under the Master and Servant's Act, 4 Geo. 4. c. 34, s. 3. The magistrate having granted a warrant, the defendant accompanied the constable who had the execution of it, and pointed out the plaintiff to him. Upon being brought before the magistrate, the complaint was heard and dismissed. Lord *Abinger*, C. B., was of opinion that the action was misconceived, and should have been in case; and thought that the evidence of interference in the arrest by the defendant was too slight to make him a trespasser; and the plaintiff's counsel not having pressed his lordship to lay that question before the jury, the plaintiff was nonsuited.

Kelly now moved to set that nonsuit aside, and for a new trial.—It is conceded, that when an information is laid

before a magistrate in a case over which he has jurisdiction, and the magistrate grants a valid and legal warrant, on which the party is apprehended, the party cannot bring trespass, but must sue in case. In such case the magistrate is bound to issue his warrant, and is not a trespasser, because he is acting within his jurisdiction; nor is the officer a trespasser, because he acts under the warrant. But that rule only applies to a case where the magistrate has jurisdiction. If a complaint be made, and the magistrate be put in motion by the party complaining, in a matter over which he has no jurisdiction, he is a trespasser, and all who act with or under him are trespassers also, because in trespass there is no distinction between principals and accessaries. There is perhaps no decision in point on this particular statute, but the case of *Moravia v. Sloper* (a) may be applied by analogy. It was there held, that when a party pleads a justification under the process of an inferior Court, he must shew that the cause of action arose within the jurisdiction of that Court. In *Rafael v. Verelet* (b), where the defendant had made a complaint to a sovereign prince in India, who had in consequence imprisoned the plaintiff, it was held that trespass was maintainable. [Lord Abinger, C. B.—I do not see in what way the defendant can be a trespasser. He goes to a magistrate, and calls upon him to exercise his judgment, and though the magistrate, if he exceeds his authority, may be liable as a trespasser, the party who lays the complaint is not. Alderson B.—The complainant has nothing to do with the assumption of jurisdiction by the magistrate. Lord Abinger, C. B.—The party does no more than lay the facts before the magistrate, who exercises his discretion judicially in granting a warrant. This distinguishes it from the case of a sheriff, who is put in motion

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(a) Willes, 30.

(b) Sir W. Black. 983, 1055.

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by the party, as he does not act judicially; but in this case the defendant does not put the magistrate in motion; he applies to a magistrate having a general jurisdiction over the subject matter, and makes his complaint, and the magistrate acts upon it or not, at his discretion. *Alderson, B.*—In *Rafael v. Verelet*, Lord Chief Justice *De Grey* says (a), “I consider the Nabob as not being the actor in this case; but the act to be done in point of law by those who procured or commanded it, and in them it doubtless is a trespass;” so that he considers the Nabob not as the actor.] There is another ground upon which the case ought to have gone to the jury, because here the defendant acted personally in the arrest, and pointed out the plaintiff to the constable. *Hardy v. Ryle* (b) and *Lancaster v. Greaves* (c) are authorities to shew that the statute 4 Geo. 4, c. 34, gives the magistrate authority only in cases where the relation of master and servant exists, and does not extend to such a case as the present. The magistrate, therefore, had no right to grant a warrant, unless he was clearly satisfied that the relation of master and servant existed. The onus of justifying the participation by the defendant in making the arrest lies on the defendant, and the plaintiff may maintain the action without producing the warrant: *Holroyd v. Doncaster* (d), *Elsee v. Smith* (e).

Lord ABINGER, C. B.—I retain the opinion which I expressed at the trial. Where a magistrate has a general jurisdiction over the subject matter, and a party comes before him and prefers a complaint, upon which the magistrate makes a mistake in thinking it a case within his authority, and grants a warrant which is not justifiable in point of law, the party complaining is not liable as a tres-

(a) Sir W. Black. 1058.

(b) 9 B. & Cr. 603.

(c) Id. 628.

(d) 11 Moore, 441; 3 Bing. 492.

(e) 1 Dowl. & Ry. 97; 2 Chit. 304.

passer, but the only remedy against him is by an action upon the case, if he has acted maliciously. The magistrate acting without any jurisdiction at all is liable as a trespasser in many cases, but this liability does not extend to the constable, who acts under a warrant, and the statute 24 Geo. 2, c. 44, was passed with this very object of protecting such officers. As to the other part of the case, I do not deny that the fact of the defendant's presence when the plaintiff was taken, and his pointing him out to the constable, might make it a case to go to the jury, but that was not pressed on the part of the plaintiff.

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BOLLAND, B.—I am of the same opinion, and for the same reasons. With regard to the case of the sheriff, that is clearly distinguishable from the present, because the party puts the sheriff in motion, and the latter acts in obedience to him. In the case of an act done by a magistrate, the complainant does no more than lay before a Court of competent jurisdiction the grounds on which he seeks redress, and the magistrate, erroneously thinking that he has authority, grants a warrant. As to the subsequent conduct of the defendant, all he does is to point the plaintiff out to the constable as the person named in the warrant, but this does not amount to any active interference. If any malice could be shewn, it might have formed the ground of an action on the case.

ALDERSON, B.—As to the first point, the party must be taken to have merely laid his case before the magistrate, who thereupon granted a warrant adapted to the complaint. Then, what has been done by the defendant to make him liable as a trespasser? He would be liable only in case, if he was actuated in what he did by malice. Then comes the second question; and I agree in the doctrine, that if the defendant took an active part with the constable in apprehending the plaintiff, he must have failed

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on the state of these pleadings, because it would have been incumbent on him to shew that he had a right so to do, which he could only have done under a special plea, and could not do under the general issue. But all that the defendant did in this instance, was to point out to the constable the party who was to be arrested. And though undoubtedly that was evidence for the jury, yet where counsel submits to the view taken of the evidence by the Judge at Nisi Prius, and does not claim to have it left to the jury, I think we ought not to interfere.

Rule refused.

BRADLEY v. HOLDSWORTH.

By a railway act, it was declared that the shares in the undertaking, or the joint stock and fund of the company, should to all intents and purposes be deemed personal estate, and be transmissible as such, and should not be of the nature of real property:—*Held*, that the shares of individual proprietors were not an interest in land, and therefore might be sold by a verbal contract.

And *semble*, this would have been so even if the act had contained no such clause.

ASSUMPSIT.—The first count was on a special contract for the sale and delivery by the plaintiff to the defendant of certain shares in the London and Birmingham Railway Company; there were also counts for money had and received, and on an account stated. The defendant pleaded, (amongst other things), fourthly, that the agreement in the declaration mentioned was and is an agreement respecting an interest in land, and that there was not any note or memorandum in writing of the said agreement pursuant to the statute. To this plea the plaintiff replied, that the agreement was not respecting an interest in land, and that there was a memorandum in writing, &c.; concluding to the country; on which issue was joined. At the trial before *Coleridge, J.*, at the last Liverpool Assizes, the plaintiff proved a verbal contract with the defendant for the sale of shares in the London and Birmingham Railway, and the breach of it; but it was contended for the defendant, that notwithstanding the provisions of the act incorporating the Railway Company,

3 & 4 Will. 4, c. xxxvi., s. 166 (a), the shares constituted an interest in land, and could not therefore be transferred without a note in writing of the contract, under the 4th section of the Statute of Frauds. The learned Judge reserved the point, and the plaintiff had a verdict for 489*l.*, leave being reserved to the defendant to move to enter a verdict for him on the fourth issue.

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Alexander now moved accordingly.—These shares constituted an interest in land within the meaning of the Statute of Frauds. In the case of *Rex v. Hull Dock Company* (b), it was decided that lands purchased by that company, and converted into a dock, were rateable to the poor, notwithstanding a clause in the act of Parliament, that the shares of the proprietors should be considered as personal property. [Lord *Abinger*, C. B.—That was a rate on the property in the hands of the company, not on the share of any individual proprietor. *Parke*, B.—No doubt the company are seised of real property, as well as possessed of a great deal of personal property; but the interest of each individual shareholder is a share of the net produce of both, when brought into one fund.] Shares in the *Vauxhall Bridge Company* have been held not to be within the reputed ownership clause of the Bankrupt Act, 21 Jac. 1, c. 19, s. 11, because the funds of the company were issuing out of real estate: *Ex parte Vauxhall Bridge Company* (c).—He referred also to *Ex parte Lancaster Canal Company* (d). [*Alderson*, B.—All the cases were under review in *Bligh v. Brent* (e), where the question was as to shares in the Chelsea Waterworks

(a) Which declares, that all the shares in the said undertaking, or the joint stock or fund of the company, shall to all intents and purposes be deemed personal estate, and be transmissible as such, and

shall not be deemed to be of the nature of real property.

(b) 1 T. R. 219.

(c) 1 Glyn. & J. 101.

(d) 1 Mont. & Bli. 94.

(e) 2 Y. & C. 268.

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 {
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LORD ABINGER, C. B.—I think there is nothing which can authorize us to say that these shares are an interest in land. The act of Parliament declares them to be personal property to all intents and purposes; your argument is, that for one purpose they are real property.

PARKE, B.—I have no doubt whatever that the shares of the proprietors, as individuals, are personalty; they consist of nothing more than a right to have a share of the net produce of all the property of the company.

ALDERSON, B.—I conceive that all the shareholders would take even without such a clause.

BOLLAND, B., concurred.

Rule refused.

POPE and Others v. BANYARD.

The Blackheath Court of Requests Act, 6 & 7 Will. 4, c. cxx, s. 22, excepts out of the jurisdiction of the Court any debt "for any sum being the balance of an account originally exceeding the sum of 5*l*."—*Held*, that this exception did not apply to an account containing items amounting to upwards of 5*l*, and reduced by payments from time to time below that sum, where it appeared that at no one time so much as 5*l* was due.

ASSUMPSIT for goods sold and delivered. Plea, non assumpsit. The particulars of the plaintiffs' demand claimed the sum of 3*l* 17*s*. 6*d*., being the balance remaining due from the defendant for coals supplied to him by the plaintiffs between August 1832 and July 1836; and at the trial before the undersheriff of Middlesex, the plaintiff had a verdict for that amount. In Hilary Term, *Welsby* obtained a rule to shew cause why a suggestion

should not be entered on the record, in order to entitle the defendant to costs under the Court of Requests' Act for the Hundred of Blackheath, &c., 6 & 7 Will. 4, c. cxx, on an affidavit stating, that, at the commencement of the action, the defendant was resident within the limits of the jurisdiction of the Court of Requests, and was liable to be summoned to that Court for the debt.

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The 6 & 7 Will. 4, c. cxx, s. 21, empowers the commissioners of the Court of Requests to decide and determine all disputes and differences between party and party *for any sum of money not exceeding 5l.* in all actions or causes of debt, and in all causes of assumpsit or insimul computasset, &c. &c.

Section 22 enacts, that nothing in the act contained shall extend to enable the said Court to judge, determine, or decide on (inter alia) any debt *for any sum being the balance of any account originally exceeding 5l.*

Section 74 enacts, that if any action or suit for any amount recoverable in the said Court of Requests, shall be sued or prosecuted in any of his Majesty's Courts at Westminster, or elsewhere out of the said Court of Requests, and it shall appear to the Judge or Judges of the Court in which such action or suit shall be tried, that at the time of commencing such action or suit the defendant was within the jurisdiction of the said Court of Requests, and was liable to be warned and summoned before the said Court for such debt or demand, then and in such case the said Judge or Judges shall not allow to the plaintiff any costs of suit, but shall award that the plaintiff shall pay such costs to the defendant as he shall justly prove that he hath incurred in the defence of such action or suit.

In their affidavit in opposition to the rule, the plaintiffs set forth the following statement of account between them and the defendant:—

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	<i>Dr.</i>	£	s.	d.
August, 1832.	To 1 ton of coals,	1	6	0
Nov. -	1 ton do.	1	8	0
May, 1833,	$\frac{1}{2}$ ton do.	0	12	0
April, 1834,	$\frac{1}{2}$ ton do.	0	12	6
Oct. 1835,	1 ton do.	1	10	0
Dec. -	$\frac{1}{2}$ ton do.	0	16	0
Feb. 1836,	1 ton do.	1	12	0
July, -	$\frac{1}{2}$ ton do.	0	15	6
		<hr/>		
		8	12	0

	<i>Cr.</i>	£	s.	d.
June, 1833.	By cash,	1	0	0
April, 1834,	do.	0	18	0
- -	do.	0	12	6
May, 1835,	do.	0	10	0
Feb. 1836,	do.	1	14	0
		<hr/>		
		4	14	6
	Balance,	3	17	6
		<hr/>		
		8	12	0

Moody shewed cause in the same term.—This is an action for the balance of an account originally exceeding the sum of 5*l.*, within the meaning of the act of Parliament; and the defendant is not, therefore, entitled to enter a suggestion. There are two classes of cases turning on the provisions of Courts of Requests' Acts; one, where the right to costs depends on the amount recovered by the verdict; the other, where the jurisdiction of the inferior court depends on the nature of the demand for which the action is brought: the present case belongs to the latter class. The cases in which it has been held that a debt reduced by part payments below the amount recoverable in the inferior court, was within the provisions

of the act of Parliament, will be found to have been all cases of the former class, where, by the words of the act, the right to costs was made to depend on the actual amount of the verdict: see *Clarke v. Askew* (a). But in *Fountain v. Young* (b), where the exception in the statute (the Southwark Court of Requests Act, 45 Geo. 3, c. 87), was of "any debt for any sum, being the balance of an account *on demand* originally exceeding 5*l.*," it was held that a debt originally above 5*l.*, but reduced below that amount by a part payment, was within the exception. *Mansfield*, C. J., there says—"It seems to have been the intention of the legislature, that long and intricate accounts consisting of various items should not be tried before this inferior tribunal. Upon the investigation of a case arising out of a debt, originally amounting to a considerable sum, but reduced by payments below 5*l.*, many nice and difficult questions might arise." There the words "the balance of an account *on demand*" were not so unqualified as in the present case. In *Abbey v. Lill* (c), where the exception was of debts "for any sum being the balance of an account *or demand* originally exceeding 5*l.*," the Court held that an action to recover 3*l.* 6*s.* remaining due on a bill of exchange for 8*l.* 6*s.*, with interest, was within the exception. This very point arose in *Moreau v. Hicks* (d), on the words of the former Blackheath Court of Requests Act, 47 Geo. 3, sess. 1. c. iv., in which the words of the exception were precisely the same as in *Abbey v. Lill*; and although the Court gave no express judgment on the point, the inclination of their opinion appeared to be, that the case of a debt reduced below 5*l.* by payments from time to time was within the exception, although it appeared (as it must be admitted it does here), that at no time was more than 5*l.* due. The

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(a) 8 East, 28.

(b) 1 Taunt. 60.

(c) 5 Bing. 299; 2 M. & P. 534.

(d) 4 Nev. & M. 563; 2 Ad. & Ell. 782.

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omission of the words "on demand" in the present set make this a stronger case. Suppose the plaintiff had demanded in his particulars the whole 8*l.* 12*s.*, as he might have done, without giving credit for the payments made from time to time, can it be said the Court of Request would have had jurisdiction? The plaintiff is bound to prove his whole account in the first instance, in order to make out the balance. Taking the case any way, this is a balance of an account which has exceeded the sum of 5*l.* And it will be productive of much inconvenience if such a case as this be held within the act, since the Commissioners cannot ascertain whether they have jurisdiction or not until the case has been gone into, and may therefore have become liable to an action of trespass, without having the means of avoiding it.

Welsby, contra.—Here it clearly appears, by the plaintiff's own statement of account, that at no given time was a debt of 5*l.* due from, and capable of being enforced against, the defendant. That distinguishes this case from *Fountain v. Young*, and *Abbey v. Lill*. *Moreau v. Hicks* is no authority against the defendant. There another point arose as to the manner of stating the defendant's residence within the jurisdiction, and it is plain that the rule was discharged on that point. [*Parke*, B.—That case is certainly no authority one way or the other.] With regard to the observation, that the Commissioners cannot ascertain whether they have jurisdiction until the case has been gone into, that applies as well to the cases where the liability to costs depends on the amount of the verdict. [*Alderson*, B.—It is not then a question of jurisdiction]. The plaintiff is, however, subject to the same uncertainty whether he shall be liable to pay costs instead of receiving them, if he sues in a superior Court. The argument on the other side must go to this extent, that even if every article, except the last, were paid for the next day after it

was purchased, yet the plaintiff, having entered them all in his books, might treat the price of the last item as a balance of account, and subject the defendant to the costs of an action in the superior Court. Small shop-bills, where the account runs on, and part payments are made from time to time, are the very matters for the recovery of which a Court of Requests is most useful; and it is difficult to see how any questions of difficulty can arise in the investigation of them, any more than of a single disputed item.

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PARKE, B.—This is a question of some importance as regards the construction to be put upon this and many similar acts; and the Court will therefore take some time to consider it, in order that the point may be settled.

Cur. adv. vult.

In the present Term, judgment was delivered by

PARKE, B.—In this case an application was made to enter a suggestion to deprive the plaintiff of costs, on the ground that the defendant resided within the limits of the jurisdiction of the Court for the recovery of small debts at Blackheath, and that the debt was recoverable in that Court. The case turned upon the question, whether the debt was so recoverable. [His Lordship read the 21st and 22nd sections of the act.] The question is, whether this action was brought for *the balance of an account originally exceeding 5l.* We think it was not.

The plaintiffs sought to recover a balance of 3*l.* 17*s.* 6*d.* due for coals, supplied at eight different times between August, 1832, and July, 1836, in small quantities; on account of which, payments were from time to time made; so that at no one time, was so much as 5*l.* due from the defendant to the plaintiffs. We are of opinion that the Court of Requests had jurisdiction to decide upon this

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debt. The meaning of the term "originally" in the clause in question, is somewhat obscure, and has not been judicially decided; but we think it is to be understood to apply to a case where credit was given at one time for an amount exceeding 5*l.*, either in one or different sums, although *afterwards* the credit might have been reduced under that sum, by part payments, before the commencement of the suit in the superior Court; and that the act of Parliament did not intend to deprive the Court of jurisdiction, whenever the plaintiff should claim, on the credit side of his account against the defendant, items altogether exceeding 5*l.*, and would, in the usual conduct of a cause, prove to that amount *originally in the first instance*, before the defendant would go into his case of payment. The latter construction might be more convenient to the Commissioners, as they would have no difficulty in ascertaining whether they had jurisdiction or not; but it would greatly narrow the utility of the Court, and disable creditors upon running accounts, for very small sums, from recovering a trifling balance. The former construction extends the jurisdiction of the Commissioners, and gives them full power to decide in all cases, except where the transactions have been on so large a scale, as that credit is given at one time for an amount of above 5*l.*

It is true that the Commissioners are, by this construction, placed in a situation of some difficulty; for, in taking the account, they will have, if they wish to be quite secure, not merely to ascertain the amount of the debts and credits, but the state of the account at different times; and if they should find that 5*l.* was ever due at one time, they cannot proceed, and the suit must be dismissed. Probably the practical inconvenience will be trifling.

For these reasons, we think the rule must be made absolute.

Rule absolute.

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DIGNAM *v.* IBBOTSON.

W. H. WATSON had obtained a rule nisi to set aside the verdict taken in this case, before the under-sheriff of Middlesex, for irregularity. It appeared from the affidavits, that the action was brought to recover an attorney's bill of costs, amounting to 7*l.* 6*s.* On the 11th of November, (the proceedings up to that date having been regular) the defendant obtained a judge's order for four days' time to plead, pleading issuably, rejoining gratis, and taking short notice of trial *if necessary*, whether tried before the sheriff or not. The defendant pleaded accordingly, and on the 22nd, an order was obtained by the plaintiff to try before the sheriff. On the 3rd of January, the plaintiff made up the issue, and gave notice of trial for the 10th, before the under-sheriff of Middlesex. The defendant, the next day, returned the issue and notice of trial as being irregular. On the same day the issue was re-delivered, with notice of trial for the 16th; which the defendant on the 5th again returned as irregular. On the 16th the cause was struck out of the paper; on the 17th the plaintiff gave a new notice of trial for the 24th, which the defendant's attorney retained. On the 25th, the cause was tried as an undefended cause, and a verdict given for the plaintiff. The defendant's affidavit stated that he resided at a distance of above forty miles from London, and that he had never received the proper notice of trial to which he was entitled.

The defendant obtained a judge's order for time to plead, pleading issuably, rejoining gratis, and taking short notice of trial *if necessary*, whether before the sheriff or not. The plaintiff subsequently obtained an order to try before the sheriff:—*Held*, that the defendant was not bound by the order to take short notice of trial, unless the plaintiff gave it for the next sitting of the sheriff after the date of the order.

The retaining an irregular notice of trial is no waiver of the irregularity.

C. Jones shewed cause.—Although in the ordinary course the defendant was entitled to fourteen days' notice of trial, that privilege was taken away by the judge's order, which bound him to take short notice of trial, if necessary—that is, if the plaintiff should think it necessary for his interests to have the cause tried as soon as possible. If

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the plaintiff had been compelled to give fourteen days' notice of trial, he must, in consequence of the four days' time allowed for pleading, have been thrown over one sitting of the under-sheriff, who sits twice a week.—He referred to *Lefevre v. Molineux* (a). Besides, the defendant, by keeping the last notice of trial, and allowing the plaintiff to go on to trial, has waived the irregularity, if there was one. [*Parke, B.*—There is no waiver by the party's keeping a bad notice; it is merely matter of courtesy to return it.]

LORD ABINGER, C. B.—You ought to have given a short notice of trial at the first sitting of the sheriff after the order was obtained. When a party is under terms to take short notice of trial at the sittings, if the plaintiff allows the sittings to go by, he ought to give the regular notice for the subsequent sittings. The same rule applies to the sittings of the sheriff. The rule must be absolute.

PARKE, B.—There is no difficulty in construing the words "if necessary," where the notice of trial is for the sittings in or after term, because they commence on a fixed day; and therefore if there be time to give the longer notice, the plaintiff is bound to do it. But where the trial is to be had before the sheriff, there is a difficulty because there are so many sittings, and there is no specific day for which to give notice. It is difficult to understand the order; but the most favourable way of construing it for the plaintiff is to say, that he is bound to give short notice for the first sittings after the date of it.

Rule absolute.

(a) 6 Dowl. P. C. 153.

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CHILD v. MARSH.

BUTT shewed cause against a rule which had been obtained for setting aside the service of the writ of summons in this cause, for irregularity. The alleged irregularity was, that the defendant, being stated in the writ as resident in the county of Worcester, was served within the city of Worcester, in which he actually resided.—He objected that the application was too late. The writ was served on the 21st of April; on the 28th an appearance was entered for the defendant; on the 30th the present rule was obtained. The application ought to have been made within the time limited for appearance: *Tyler v. Green (a)*, *Edwards v. Collins (b)*.

A defendant seeking to set aside the service of a writ of summons for irregularity, must apply within the time limited for appearance.

PARKE, B.—That gives quite time enough for the application in ordinary cases. On the authority of those cases, we think the defendant was too late; and it seems to me that they put a very reasonable interpretation on the rule of Court.

W. H. Watson in support of the rule.

Rule discharged, with costs.

(a) 3 Dowl. P. C. 439.

(b) 5 Dowl. P. C. 228.

JONES v. SHIEL.

BAYLEY moved in this case for a rule to compute principal and interest on a promissory note. It was an action of debt for goods sold and delivered, and on a pro-

After the delivery of a declaration in debt for goods sold and on a promissory note,

the defendant paid the plaintiff 150*l.* "on account of the cause," leaving a balance due less than the amount of the note:—*Held*, that the plaintiff could not have a rule to compute principal and interest on the note, without the count for goods sold being first struck out of the declaration.

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missory note. The defendant, after the declaration was delivered, paid the plaintiff the sum of 150*l*. "on account of the cause," leaving a balance due which was less than the amount of the note. The plaintiff had obtained a rule nisi to compute, which was made absolute without cause shewn; but the Master refused to compute, on the ground that, under the circumstances, the plaintiff was bound to execute a writ of inquiry. *Bayley* contended that the Master ought to have entertained the case, inasmuch as the plaintiff had a right to ascribe the payment of the 150*l*., which was paid generally, to the goods sold. [*Parke, B.*—Assuming that to be so, at all events there must be nominal damages on the count for goods sold; the plaintiff cannot enter a nolle prosequi.] He may enter a remittitur as to the damages on that count. [*Parke, B.*—No, he cannot, because he has received them. You might have taken out a summons to strike out the count for goods sold. It is true, if you go down to trial, you must give credit for the 150*l*.; but that must be done on a writ of inquiry.] The defendant ought to be concluded by not having shewn cause against the rule.

PARKE, B.—Not when the Master thinks it irregular. If the other side agree that you shall enter a nolle prosequi on the count for goods sold, and yet keep the 150*l*., you may then execute your rule to compute; but as the case now stands, there must be a writ of inquiry.

Rule refused.

M'KINNELL v. ROBINSON.

Money lent for the purpose of gaming, and of playing with at an illegal game, such as Hazard, cannot be recovered back.

ASSUMPSIT.—The second and third counts of the declaration were in indebitatus assumpsit for money lent, and for money found to be due upon an account stated. To these counts the defendant pleaded, that the said sum of 30*l*. in the second count mentioned, was borrowed

by the defendant, as the plaintiff then well knew, and was knowingly lent by the plaintiff to the defendant, in a certain common gambling room, in and parcel of a certain messuage and premises, for the purpose of the defendant's illegally playing and gaming therewith, at and in the said gambling room, at a certain illegal game, to wit, the game of Hazard, contrary to the statute in such case made and provided; and that the account in the last count mentioned was had and stated of and concerning the said sum of 30*l*. in the second count mentioned, also borrowed and lent as aforesaid, and for and in respect of no other debts or monies whatever. Verification.

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Demurrer, assigning for cause, that the several matters in the last plea pleaded and set forth afford no answer to the second and last counts, inasmuch as money lent for the purpose of gaming with, as in the last plea mentioned, and money found to be due on an account stated respecting money so lent, is recoverable by action at law.

Crompton in support of the demurrer.—It has been settled that it is no defence to an action for money lent, that it was lent for the purposes of gaming, and that the statute 9 Anne c. 16 does not avoid parol contracts, but only the securities given for money knowingly lent for the purposes of gaming. In *Barjeau v. Walmsley* (a), the plaintiff having won all the defendant's ready money at tossing for five guineas a time, lent him ten guineas at a time, and won it, till the defendant had borrowed 120 guineas: and it was held, in an action for money lent, that this was not a case within the statute 9 Anne c. 14. That statute enacts (section 1), that "all notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever, given, granted, drawn, entered into, or exe-

(a) 2 Stra. 1249.

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cuted by any person or persons whatsoever, where the whole or any part of the consideration of such conveyances or securities shall be for any money, or other valuable thing whatsoever, won by gaming at cards, dice, tables, tennis, bowles, or other games whatsoever, or by betting on the sides or hands of such as do game at any of the games aforesaid, or for the reimbursing or repaying any money knowingly lent or advanced for such gaming or betting as aforesaid, or lent and advanced at the time and place of such play, to any person or persons so gaming or betting as aforesaid, or that shall, during such play, so play or bet, shall be wholly void." And in *Robinson v. Bland*, (a) Lord *Manfield* says: "As to the money lent, the sense of the legislature seems to me to be agreeable to the cases that have been cited. The act of 16 Car. 2, c. 7, s. 3, does not meddle with money lent at play. But as to money lost, and not paid down at the time of losing it, it says, 'That the loser shall not be compellable to make it good; but the contract and contracts for the same and for every part thereof, and all securities, shall be utterly void,' &c. The words, 'contract and contracts for the same,' are not in 9 Anne, and I dare say designedly left out." And *Wilmot*, J., says: "As to the money lent, the cases that have been cited are in point that it is recoverable. But if there were none, yet I should be clear that the plaintiff may maintain an action for *that*." In that case there was a security given also, and *Wilmot*, J., adds, "The contract may certainly be good, though the security be void." So in *Alcinbrook v. Hall*, (b) it was held that an action lay, where money had been lost by the defendant on a bet upon a horse race, which had been paid by the plaintiff at the defendant's request. And in *Wettenhall v. Wood*, (c) it was ruled by Lord *Kenyon* that money

(a) 2 Burr. 1077; 1 W. Black. 260.

(b) 2 Wilson, 309.

(c) 1 Esp. 18.

lent to play with, without any security, was recoverable in assumpsit. Lord *Kenyon* was clearly of opinion that it was recoverable, "for that the stat. 9 Anne c. 14, only avoided *securities* for money lent to play with, and did not extend to cases of mere loans without any security taken." The case of *Young v. Moore*, (a) where the defendant, who had been arrested for money won at play, was discharged out of custody on entering a common appearance, does not affect the question, that being the case of money lost at play. All the cases shew that the money being lent for the purpose of playing with, or of paying losses at play, does not prevent a contract to repay the loan from arising.

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Wightman, contra.—This plea states that the money was knowingly lent by the plaintiff to the defendant in a common gambling room, in and part of a certain messuage and premises, for the purpose of the defendant illegally playing and gaming therewith, at and in the said gambling room, at a certain illegal game, to wit, the game of Hazard; so that the demurrer admits, that the money was expressly lent for the purpose of playing at Hazard. In all the cases which have been cited, it was hardly brought to the attention of the Court, that the party must recover through the medium of an illegal transaction. All the subsequent cases proceeded upon the authority of *Robinson v. Bland*, where it does not appear that the money was lent to play at an illegal game, but the contrary, for the act of gaming was not illegal in France, where the money was lent; and it was said that it might have been a very meritorious act, as Sir John Bland, being in a foreign country, might very naturally have been distressed, under his then situation amongst foreigners, for want of ready money, or knowing how to procure it. But here this game is alto-

(a) 2 Wils. 67.

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gether illegal. [Lord *Abinger*, C. B.—How do you shew it to be illegal?] It is a game prohibited by the stat. 16 Car. 2, c. 7. The second section of that statute enacts, that if any person shall by fraud, shift, cousenage, circumvention, deceit, or unlawful device, or ill-practice whatsoever, in playing at or with cards, dice, tables, &c., win any money, every person so offending shall forfeit treble the value of the money so won. [*Alderson*, B.—The game of Hazard is expressly mentioned in the 12 Geo. 2, c. 28. The first section recites the former statutes; and the second declares, that the games of the Ace of Hearts, Pharaoh, Bassett, and Hazard, are, and are thereby declared to be, games or lotteries by cards or dice within the meaning of the before recited acts; and that every person keeping or maintaining the said games shall be subject to the penalties inflicted by that act upon any person who should set up, erect, continue, or keep any of the games or lotteries in that act mentioned. And the third section prohibits the playing at those games under a penalty of 50*l*. *Bolland*, B.—The statute 16 Car. 2, c. 7, does not make it illegal to play at games with cards or dice; it only makes cheating at those games illegal. *Parke*, B.—The stat. 18 Geo. 2, c. 34, appears to make it illegal to play at any game with cards or dice. The second section enacts, “that if any person or persons whatsoever shall play at the game of Roulet, otherwise Roly-poly, or at any game or games with cards or dice already prohibited by law, every such person so offending shall incur the penalties” directed by the stat. 12 Geo. 2, c. 28. This is money lent to a man to enable him to do an illegal act.] All that the defendant has to shew is, that Hazard is an illegal game, and it is quite clear that it is so. All the text writers have fallen into the error, that *Robinson v. Bland* decided that money lent to play with, though at an illegal game, could be recovered back; but it decided no such thing. [Lord

Abinger, C. B.—Have you looked at *Cannan v. Bryce* (a), *Exch. of Pleas*, 1838. which was decided by Lord Chief Justice *Abbott*, and the Court of King's Bench? Yes. It was there held, that money lent, and applied by the borrower, for the express purpose of settling losses on illegal stock-jobbing transactions, to which the lender was no party, but knew the purposes to which the money was to be applied, could not be recovered back by him:—that as the act of Parliament had prohibited the transaction, the contract whereby it was to be carried into effect was illegal.—He also cited *Clayton v. Dilly* (b), and *Hastelow v. Jackson* (c).

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Crompton, in reply.—The statutes which have been referred to do not make it illegal in two individuals to play at Hazard; it is only playing at public gaming tables that is prohibited by them. There are two classes of enactments. The statutes which regulate private gaming, and which alone are applicable to this case, are the 16 Car. 2, c. 7, and the 9 Anne, c. 14. The other class was to prevent the setting up lotteries and gaming tables. In the old statute of 33 Hen. 8, c. 7, s. 11, a penalty of 6*s.* 8*d.* is imposed upon persons maintaining a house for unlawful gaming. Then comes the 9 Anne, c. 14, which was followed by the 12 Geo. 2, c. 28, which recites the 10 & 11 Will. 3, c. 17, 9 Anne, c. 6, and other acts, which have relation only to public lotteries and gaming tables. If the 12 Geo. 2 was intended to apply to the 9 Anne, c. 14, it is extraordinary that it is not recited in it. The third section of that act depends upon the first. The former enacts, that all and every person and persons who shall be adventurers in any of the said games, lottery or lotteries, sale or sales, or shall play, set at stake or punt at either of the said games of the Ace of Hearts, Pharaoh, Basset, and Hazard, shall forfeit

(a) 3 B. & Ald. 179.

(b) 4 Taunt. 165.

(c) 8 B. & Cr. 221.

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the sum of 50*l*.;—that is, if they play at such games at such tables as are mentioned in the first section, which are public gaming tables. If this plea had shewn that the transaction took place at a common gaming table, it might have been an answer. [Lord *Abinger*, C. B.—The exception of royal palaces, in the 11th section, shews that the act extends to all other houses.] The 18 Geo. 2, c. 34, seems to point to the two distinct classes of cases. The 9 Anne, c. 14, is not referred to in the two first clauses, which relate to public gaming tables, but is referred to and recited in the third section, where the act proceeds to the regulations of both public and private gaming. It does not appear upon this plea that the money was lent to play with at a common gaming table, which it is submitted it ought to do, to shew that it was an illegal contract. [*Alderson*, B.—In *Cannan v. Bryce*, Lord C. J. *Abbott* distinguishes the Stock Jobbing Act, 7 Geo. 2, c. 8, from the statute against gaming; and says, “for the latter contains no prohibition against the payment of money lost at play.”] In *Pellecat v. Angell* (a), it was held, that a foreigner selling and delivering goods abroad to a British subject might recover the price, although he knew, at the time of the sale, that the buyer intended to smuggle them into this country. It is submitted that this game is not an illegal one, unless it is played at some public table, and that that ought to appear on the plea. The defendant ought to shew that it is a game which is positively prohibited. The statutes which prohibit Hazard seem only to apply to public gaming, and the plea does not make this out to have been of that nature.

Cur adv. vult.

The judgment of the Court was now delivered by

Lord ABINGER, C. B.—(After stating the pleadings):

(a) 2 C. M. & R. 311.

As the plea states, that the money for which the action is brought, was lent for the purpose of illegally playing and gaming therewith, at the illegal game of "Hazard," this money cannot be recovered back, on the principle, set for the first time laid down, but fully settled, in the case of *Cannan v. Bryce* (a). This principle is, that the repayment of money, lent for the express purpose of accomplishing an illegal object, cannot be enforced; and there is no doubt, but that it is illegal for any person to play at Hazard, by the 12 Geo. 2, c. 28, s. 2 & 3, and 18 Geo. 2, c. 34, s. 2, which impose a penalty of 50*l.* on all and every person who shall play at that game. But, it is contended, that the authorities are so strong in favour of the maintenance of the action, that we ought not to decide against them. Those relied upon by the plaintiff are the cases of *Barjeau v. Walmsley* (b), *Robinson v. Bland* (c), and *Wettenhall v. Wood* (d). The first of these cases was decided upon the 9 Anne, c. 14 only. The action was not for money lent for the purpose of playing at a game expressly prohibited by the statute 12 Geo. 2, or any other act; but for money lent exceeding 10*l.* for the purpose of playing with it; and the propriety of the decision, upon the construction of the statute of Anne itself, may well be questioned, as there is much weight in the observation made in the subsequent case of *Young v. Moore* (e), that as the statute has made all securities for money won at play void, a fortiori, all parol contracts of that sort are void. In *Robinson v. Bland*, also, the money was not lent to play with at an *illegal* game; and in *Wettenhall v. Wood*, Lord Kenyon, at Nisi Prius, held that money lent to play with at a common gambling house could be recovered back, his Lordship adverting only to the statute of 9 Anne, c. 14,

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(a) 3 B. & Ald. 179.

(b) 2 Strange, 1249.

(c) 1 W. Black. 260; 2 Burr.

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(d) 1 Esp. 16.

(e) 2 Wils. 67.

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and not having in view the provisions of 12 & 18 Geo. 2, by which all play at certain games is prohibited, and they who play rendered liable to penalties.

The case of *Alcinbrook v. Hall (a)* was also cited for the plaintiff. It was an action for a sum exceeding 10*l.*, paid by the plaintiff for the defendant, for a lost wager at a horse-race, and is like the case of *Barjeau v. Walmsley*; it was held that it was recoverable back, notwithstanding the statute 9th Anne. It may be doubted, since the case of *Cannan v. Bryce*, whether this case would now be supported; at any rate, the present differs from it, as all play whatever at the game of Hazard is prohibited.

We therefore think, that notwithstanding these authorities, the money lent cannot be recovered; for it is lent for the express purpose of a violation of the law, and enabling the borrower to do a prohibited act; and the principle is now distinctly laid down in the case above cited, and may be considered as finally settled, that money so lent cannot be recovered.

Judgment for the defendant.

(a) 2 Wilson, 309.

DENDY v. POWELL.

A plea of set-off stated that, at the time of the commencement of the action, the plaintiff *was indebted* to the defendant in sums of money exceeding the debt claimed by the plaintiff, but omitted to add, "and *still is*" indebted:—

Held, on demurrer, that the plea was bad.

DEBT for money paid, money lent, &c. Plea, "that the plaintiff, before and at the time of the commencement of the suit, *was indebted* to the defendant in &c., which said sums of money so due and owing from the plaintiff to the defendant, exceed the supposed debt above demanded, and all damages ever sustained by the plaintiff by reason of the detention thereof, and out of which said sums of money so due and owing to the defendant, he the defend-

ant is ready and willing, and hereby offers, to set off and allow to the plaintiff the full amount of the said debt and damages, according to the form of the statute in such case made and provided. Verification.

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Special demurrer, assigning for causes, that the said plea does not traverse or deny any material allegation in the declaration, nor does it confess and avoid the causes of action to which it is pleaded, in this, that though it sufficiently confesses and admits the said causes of action; yet the defendant seeks to avoid the same, by stating that before and at the time of the commencement of the suit, the plaintiff was indebted to the defendant, without shewing or averring that the said supposed debt is still in existence, and unpaid and unsatisfied; and thus attempts by inference only to shew a debt in existence, whereas the plea ought to have averred, that at the time of the commencement of this suit, the plaintiff was and still is indebted, inasmuch as a defendant can set off only those debts which were due to him from the plaintiff at the time of the action brought as well as at the time of plea pleaded; and for that it does not appear in and by the said plea, that there is any debt due and owing from the plaintiff to the defendant, whereas it ought to have been shewn and alleged affirmatively, that the said debt therein stated to be due and owing from the plaintiff to the defendant at the commencement of the suit was still an existing debt, and ground of set-off; and for that the said second plea is uncertain, and that no certain or sufficient and material issue could be taken thereon, which would decide the cause.

Wightman, in support of the demurrer, was stopped by the Court, who called upon

S. Hughes to support the plea.—The plea is good, and sufficiently shews that the debt which the defendant seeks

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to set off is an existing debt. Pleas in general refer to the time of the commencement of the action, and nothing which has taken place subsequently can be taken notice of. *Le Bret v. Papillon (a)*. In *Evans v. Prosser (b)*, it was held, that a plea of set-off that the plaintiff was indebted to the defendant *at the time of the plea pleaded*, was bad. If the plea had stated that the defendant was *still* indebted, those words would be immaterial, and no issue could be taken upon them. A man has no right to bring an action against another, if the other has a claim to a larger amount against him. [*Alderson, B.*—Where do you find it laid down that a party is obliged to set off his debt? The statute of set-off is not compulsory.] The plea alleges, that at the time of the commencement of the action, the plaintiff was indebted to the defendant in a greater amount than that claimed by the plaintiff. [*Alderson, B.*—For all that appears by the plea, the defendant's claim may have ceased to exist since the action was brought.] If so, that might have been specially replied. *Jackson v. Goddard (c)*.

LORD ABINGER, C. B.—The Court are all of opinion that this plea is bad. No doubt, all pleas refer to the time of the commencement of the action; but until the defendant offers to set off his cross demand against the plaintiff's claim, the plaintiff cannot know that he means to do so.

PARKE, B.—The rule is, “*verba fortius accipiantur contra proferentem.*” The defendant does not plead that this is an existing debt; then we cannot infer that it is so, but have a right to infer that it has been satisfied.

ALDERSON, B., and GURNEY, B., concurred.

Judgment for the plaintiff.

(a) 4 East, 502.

(b) 3 T. R. 186.

(c) 1 C. & M. 46.

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ASSUMPSIT.—The declaration stated, that on the 22nd of March, 1837, it was agreed between the plaintiff and the defendants that the plaintiff should sell to the defendants, and the defendants should buy of and from the plaintiff, and the plaintiff then sold to the defendants, 200 tons of Bog Mine lead, deliverable in the river Thames, to be paid for by the buyers' acceptance at six months, or three months with the deduction of $1\frac{1}{2}$ per cent. discount, or by cash with $2\frac{1}{2}$ per cent. discount, at the buyers' option. The declaration then averred mutual promises, and alleged that after the making of the agreement, and at and within a reasonable and proper time in that behalf, to wit, on the 1st of May, 1837, the plaintiff was ready and willing, and then tendered and offered to the defendants to deliver to them the said 200 tons of Bog Mine lead in the river Thames aforesaid, at the price aforesaid, and then requested the defendants to accept the same at the price and upon the terms aforesaid, &c. Breach—that the defendants did not nor would accept or pay for the same or any part thereof, whereby the plaintiff was obliged to sell and dispose of it to other persons for 3,200*l.*, being less than the sum agreed to be paid by the defendants by the sum of 1,200*l.*

Pleas—first, non assumpservit; secondly, that the plain-

A., the proprietor of a lead mine called the Bog Mine, situate near Shrewsbury, sold to B., a leadmerchant in London, by a written contract, "200 tons of Bog Mine lead, at 22*l.* per ton, deliverable in the river Thames." The broker who made the contract stated at the time, in answer to a question by B., that the lead was ready for shipment. A few days afterwards B. applied to the broker to know whether A. would agree to allow the freight or insurance from Gloucester or Liverpool, to which A. agreed, but B. subsequently required the lead to be delivered in London. It appeared that Gloucester and

Liverpool were the usual ports of shipment for London; but the Bog Mine lead was first brought by barges down the Severn from Shrewsbury to Gloucester. The lead was delayed a considerable time in this part of its transit by the lowness of the water, and when it arrived in London, B. refused to receive it, the price having fallen considerably. In an action by A. against B. for not accepting the lead, B. pleaded that the plaintiff was not ready to deliver it within a reasonable time, on which issue was joined. The broker stated (in addition to the above facts) that he had understood from A. that the lead was at Shrewsbury. The learned Judge stated to the jury that it might be taken for granted that the understanding of the parties was, that the lead was ready for shipment at Gloucester or Liverpool; that this was confirmed by the defendant's application as to the freight and insurance; and that if they thought it ought to have arrived in a shorter time, if ready for shipment at Gloucester or Liverpool, the defendant was entitled to a verdict:—*Held*, that the parol representation of the broker, that the lead was ready for shipment, was admissible in evidence, not to vary the written contract, but as one of the data from which the reasonableness of the time was to be determined.—*Held*, also, that the direction of the learned Judge was warranted by the evidence.

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tiff was not ready or willing, and did not tender or offer to the defendants to deliver to them the said 200 tons of Bog Mine lead in the declaration mentioned, or any part thereof, within a reasonable or proper time in that behalf, in manner and form, &c.: on which issues were joined.

At the trial before Lord *Abinger*, C. B., at the sittings at Guildhall after last Michaelmas Term, the facts appeared to be as follows:—

The plaintiff, at the time of making the contract with the defendants on which this action was brought, was the owner of one half of a valuable lead mine in Shropshire, called the Bog Mine. The defendants were extensive lead merchants in London. On the 22nd of March, 1837, the defendants contracted to buy of the plaintiff, through the medium of the firm of J. & J. Soper, brokers in London, 200 tons of Bog Mine lead. The following is a copy of the bought note:—

“ London, 22nd March, 1837.

“ Bought per account of Messrs. Wm. Thompson & Co.,
Of Mr. Thomas Ellis,

“ Two hundred tons of Bog Mine lead, deliverable in the river Thames, at 22*l.* per ton; to be paid for by the buyers' acceptance at six months, or three months with the deduction of one and a quarter per cent. discount, or by cash with two and a half per cent. discount, at buyers' option.

JNO. & JAS. SOPER, Brokers.”

Mr. Soper, the broker, being called for the plaintiff, stated on cross-examination, that when the defendant, Mr. Thompson, had bought the lead, but before the bought and sold notes were made out, he asked the witness whether the lead was ready for shipment, and the witness said it was. This evidence was not objected to by the plaintiff's counsel. The witness stated also, in answer to questions by the Lord Chief Baron, that the plaintiff always told him his lead was from the Bog Mine, and

came down to Shrewsbury, and he (the witness) took it for granted it was to be shipped at Shrewsbury. On the 25th of March, the witness saw the defendant Kebbel, who asked him whether the plaintiff would be agreeable to allow the freight or insurance from Gloucester or Liverpool; which it appeared were the usual ports from which goods from Shropshire were shipped for London. This request was communicated to the plaintiff, who assented to it; of which Soper informed the defendant Kebbel. Messrs. Soper subsequently, however, received a letter from the defendants (dated 5th April), as follows:—

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“Gentlemen.—We will thank you to give instructions immediately for the shipment of the whole of the 200 tons of Bog Mine lead, purchased by us of Mr. Ellis. We require it all delivered here.”

“WM. THOMPSON & Co.”

It was proved also that the Bog Mine lead was smelted at a place called Ponsbury, about half way between Shrewsbury and the mine, and sixteen miles distant from Shrewsbury; that it was then sent on to Shrewsbury, and there laid up until the plaintiff's agent there had an order to forward it, when it was shipped on the river Severn, in barges drawn by horses, to Gloucester, and thence by sea to London; that at the time of making the contract with the defendants, the plaintiff had 300 tons of the Bog Mine lead laid up at Shrewsbury ready for shipment thence, and on the 5th of April, an order was given to the agent there to forward it as soon as he possibly could. There was not, however, water enough in the Severn for it to get down so quickly as usual, and a delay of several weeks was thereby necessarily occasioned; the plaintiff, in consequence, applied to the other part owner of the Bog Mine, Mr. Cross, to allow him to use some lead of his which was lying at Gloucester, in order to make up the quantity

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for the defendants; Mr. Cross agreed to do so; and the 200 tons were shipped for London, 133 on the 11th, and the remaining 67 on the 15th of May. On the 12th of May, the defendants returned the bill of lading of the 133 tons, which had been transmitted to them, and refused to have anything to do with the lead. It arrived in London on the 27th. The price had then fallen to 16*l*. per ton, after which rate the defendants offered payment to the plaintiff. The plaintiff declined to accept it as any fulfilment of the contract; but it was agreed that the lead should be taken by the defendants at that price, on the same terms as if it had been sold to a third party in consequence of the defendants having refused to accept it after tender made, without prejudice to the question between the parties.

The Lord Chief Baron, in summing up, stated to the jury that, in his opinion, it might be taken for granted that the understanding of the defendants, and of the broker, was, that the lead was ready for shipment at either Gloucester or Liverpool; and that this conclusion was confirmed by the application made by the defendant Kebbel, to know whether the plaintiff would consent to pay the freight and insurance from Liverpool or Gloucester, as the case might be; and that the defendants had a right to expect that the lead should be delivered within a reasonable time, with reference to the average voyage from one or the other of those ports to London; and he told the jury, that if they thought the lead ought to have arrived in a shorter time, if ready for shipment at *Gloucester or Liverpool, according to the representation*, the defendants were entitled to the verdict. The jury having found a verdict for the defendants,

Crowder, in Hilary Term, obtained a rule nisi for a new trial, on two grounds: first, that the evidence of the parol

representation made by the broker, that the lead was ready for shipment, was improperly admitted to vary the written contract between the parties; and secondly, that the learned Judge had not left to the jury the construction to be put on that statement, and upon the defendants' application for allowance of the freight and insurance, which did not necessarily import that the lead lay for shipment at Gloucester or Liverpool, but might mean only that the defendants desired to have the option of disposing of the lead at either of those ports, on its arrival there from Shrewsbury.

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Maule and Sir *W. Follett* now shewed cause.—In the first place, even if the parol representation made by the broker were not properly admissible, yet having been admitted, and summed up to the jury, without any objection on the part of the plaintiff, he cannot now raise the objection to its admissibility. It is not alleged that the verdict was not fully warranted by the evidence. And the Judge ought not to exclude from the consideration of the jury any evidence given in the cause, which has been admitted without objection, and is relevant to the issue. It cannot be said that this evidence was not relevant, but it is urged that it cannot be admitted to *vary* the terms of the written contract. That is a rule of law for the *exclusion* of evidence, which, in respect of its quality, ought not to be admitted at all. The objection ought, therefore, if at all, to have been taken at the trial.

But secondly, the evidence was properly admitted, and the direction of the learned Judge was perfectly correct. The parol statement of the broker was not received to *vary* the contract, but to *apply* it to the particular issue—the question of reasonable time. What is a *reasonable time* for the performance of a contract (that being a term imported into the contract by law) depends on the subject matter of the contract, and the circumstances under which

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it is made. Now, on the face of the contract itself in this case, nothing appears to shew where the lead was, or that it was not to be deliverable at once. The term "Bog Mine" is descriptive only of the quality of the lead. Any 200 tons of Bog Mine lead, wherever they might be, would answer the terms of the contract. Then, the statement of the broker, that the lead was *ready for shipment*, it appearing also that Gloucester and Liverpool were the usual places of shipment, apply the *reasonable time*, which is an implied term in the contract, to the time which ought reasonably to be occupied by a voyage from such place of shipment to the river Thames, where the lead was deliverable. *Shipment* cannot properly mean any thing but a loading on board a vessel to be sea-borne. The reasonableness was to be calculated from all the circumstances *known to the defendants*, to which the contract was subject. This declaration of the broker was one of such circumstances : just as the plaintiff gave in evidence the situation of the Bog Mine, and the existence of the depôt at Shrewsbury, to shew that those were facts notorious to all, *and therefore* known to the defendants, which ought to induce the conclusion that the reasonable time was to begin from Shrewsbury. The plaintiff would be clearly liable in respect of an unreasonable delay, though it was by reason of the state of the weather or of the navigation. Then, the construction put by the Lord Chief Baron on the defendant's application as to the freight, was clearly the right one. It only imported that the defendant did not know at which of the two ports the lead was. The language is manifestly that of a person who is speaking of goods which he understood to be in a capacity to be shipped.

Crowder and Kaye, contra.—With regard to the argument that the evidence of the broker ought to have been objected to when given, that could not have been done, because it was strictly admissible, as a declaration made

by the plaintiff's agent that in fact the lead was ready for shipment,—supposing it not to have been shown where the lead was. But it is altogether a different question, whether it was to be incorporated into the contract, as a kind of warranty that the lead was ready for shipment *at a particular place*. The defendants, extensive lead merchants, dealing with the plaintiff, the proprietor of the Bog Mine, must have known where that mine was, and that the lead was to come from thence. [*Parke, B.*—The defendants say it does not *vary* the contract—that, notwithstanding this representation, the plaintiff was not bound to deliver lead lying at Gloucester or Liverpool; but that it was only applicable to shew in what time the defendants had a right to expect the delivery.] It appeared that in fact, so far at least as the party who made this representation understood, the plaintiff's lead was at Shrewsbury. Then he says it is ready for shipment, not saying where; and yet it is to be inferred that it was at Gloucester or Liverpool: the summing up of the learned judge *assumes* that to be the case. Although, therefore, it does not bind the plaintiff to deliver lead lying there, yet it does bind him to deliver lead which is to be assumed, for a collateral purpose, to come from thence. Conceding that the representation of the broker is *one* of the data by which the contract is to be applied, there were other data which ought also to have been taken into consideration, but were not; viz. that the plaintiff was the owner of the Bog Mine—that the defendants must have known its situation—that the broker understood the lead was at Shrewsbury. It was not left to the option of the jury what the parties understood by its being, according to the representation, ready for shipment. The same observations apply to the conversation between the broker and the defendant Kebbel: it was, at all events, capable of the construction put upon it on the plaintiff's part, and the jury ought to have decided which was the right one.

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LORD ABINGER, C. B.—I am glad this case has undergone this discussion, as it was considered that one point was of some importance. The action is brought on a contract for the sale of Bog Mine lead, and the allegation in the declaration is, that the plaintiff was ready and willing to deliver it within a reasonable time; and the issue is, not upon the construction of the contract, but upon the collateral point, whether the plaintiff was ready to deliver it within a reasonable time. Now it has been contended, first, that I ought not to have received in evidence the statement of the broker, that the lead was ready for shipment, because that implies a variation of the contract; and that the plaintiff could not be bound by any representation of his agent, unless it was a representation made in fraud, which rendered the contract void. That proposition is very specious, but it appears to me to have no just application to this case. The question of reasonable or not reasonable time is collateral to the contract. If the contract itself had disclosed any thing about time, it might have explained all the circumstances; or if the contract had contained any specification of the particulars from which the time could necessarily be inferred, in like manner it would exclude all parol communication that could alter such necessary inference. But where the contract is entirely silent, how are you to judge of the reasonableness of the time, if you are to exclude all evidence whatever by which it is to be computed? Suppose a man contracts to sell certain goods, and the parties agree that the goods shall be conveyed to London, and nothing be said about the time of delivery, would it not be essential to ascertain what the parties were contracting about, and whether any thing was said at the time, and whether, the reasonable time not being shewn by the contract itself, you could derive it from other sources? Therefore, in every contract of this sort, the circumstances from which the reasonableness of the time is to be inferred, must be

collected from the parol evidence. Now, Mr. Crowder contends he was at liberty to give parol evidence to shew that there was lead ready for shipment at Shrewsbury; at least, that such was the broker's belief; admitting that he never stated that to the other side. That very argument is framed on the supposition that you must receive circumstantial evidence. Then the question is, the goods being described as ready for shipment, where was the usual place for the shipment of this particular description of lead? It is admitted that the usual places of shipment for London are Gloucester and Liverpool; but it is now contended that the broker had contemplated very differently in his own mind, and what was passing in his own mind ought to be before the jury, though he did not communicate it to the defendants; and that the defendants, having been before concerned in these matters, ought to have known what was in the broker's mind; and that both parties must have known the usual place of shipment to be Shrewsbury. It appears to me that it is quite preposterous to suppose you can admit the broker's opinion, and the broker's knowledge, as data for deciding the reasonableness of the time, and exclude at the same time the other circumstances of the case. It is said, however, that the circumstances of the application in which a deduction was claimed by Mr. Kebbel, in respect of the freight and insurance, furnish a reason why the time should be computed from Shrewsbury. It seems to me that this argument is fallacious. I own I assumed that the parties contracting supposed they were contracting for lead ready to be shipped at Gloucester or Liverpool; and, having made that contract, an application is made to the seller to be relieved from freight and insurance from one of those two places, whichever it may be, it being convenient to the defendants to sell the lead again at the place where it was ready to be shipped: and it is also in evidence, that this is an article which fluctuates considerably in price, and it might be

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very convenient for the parties to sell it, without taking upon themselves the expense of its coming to London, and selling it at a later period. It appears to me that if the parties had contemplated that the goods were at Shrewsbury, they would equally have contracted to be relieved from the freight from Shrewsbury as from Gloucester or Liverpool; and the omission of that seems to shew that Gloucester and Liverpool were the two salient points, (if I may so speak) from which this contract was to proceed. I think I told the jury, that, as the contract was silent upon the subject, we could only know what the parties were dealing about from their conversation before the contract was entered into in writing, when it was said the goods were ready for shipment. It occurred to me that the defendants would never have made so blind a bargain as to purchase lead, which, for aught they knew, might be subjected to a long and difficult navigation from Shrewsbury to Gloucester; they would naturally ask some questions respecting the lead, being, as it is, an article which might rise or fall very much in price; and I take it for granted that Messrs. Thompson & Kebbel, who were eminent lead merchants, would ask the question, "Where is the lead you mean to sell us?" the answer is, "Ready for shipment;" which it is said they supposed to mean ready for shipment at Shrewsbury: if they did, they must be aware they would be bringing upon themselves the responsibility of a very long and difficult navigation, which might be many weeks before it was accomplished. I think it is plain they did not mean to take into the account the transit from Shrewsbury at all. It appears to me, therefore, that I was correct in stating to the jury, that the reasonable time was to be calculated from the place from which the parties, by their conversation at the time, must be taken to have understood that the goods were to be shipped, namely, from Gloucester or Liverpool. I am of opinion, therefore, that the rule ought to be discharged.

BOLLAND, B. (a)—I am of the same opinion, that the rule should be discharged. When this case was brought before the Court, it was moved on the ground of misdirection; but, throughout the argument which has taken place, and which, on both sides, has been strongly and plainly put to the Court, it does not appear, from any thing the Chief Baron is reported to have said, that there was any misdirection. I confess that I felt a good deal the force of the argument urged by Mr. *Maule* on the part of the defendants, that it was too late for the plaintiff to make the objection that has been made. When a party omits to make an objection to a question, and relies upon the answer being in his favour, and it turns out differently, it is too late then to come and complain of counsel in putting, or the Court in allowing such a question to be put. There are many questions and answers given in Court which are not strictly regular; there are many cases in which evidence is admitted by the Court, which, if the party on the other side had objected to it at the trial, as not being proper evidence, it would have been the duty of the judge to refuse. But, upon looking at the question put to the broker, it does not appear to me that any objection to it could have prevailed. From the manner in which Mr. *Crowder* has put the objection to-day, he seems to consider that the evidence for some purposes would have been admissible in this case; and it appears to me that it is admissible for the purpose for which the defendants use it. The question was, "whether or not the article in question was ready for shipment:" the answer is, "Yes:" and it is said my Lord has put an interpretation upon the contract which he ought not to have put, by directing the jury, on this part of the case, that by the term *shipment* was meant shipment at or from a port from which a transit could be had into the river Thames, and that

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(a) *Parke*, B., had left the Court during the argument.

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the navigation between Shrewsbury and Gloucester could not, in mercantile terms, be considered a shipment. I cannot say that this is any misdirection in point of law. The learned Judge may be considered, in what he said, as giving what, in his opinion, was an explanation of the term shipment; and the jury, who were very capable of judging on the point, adopted his interpretation. Then, is there any thing in the contract itself which would mark out any point of locality of the lead at the time the purchase was made, from whence the reasonable time of its transit could be inferred, or which could shew that it was necessarily at Shrewsbury? Lead coming from different mines may be at different points; there is no description given which shews the Court or the jury that the lead must necessarily be lying at Shrewsbury. We then have no proof, but what has been stated by the broker, what the *shipment* meant: that statement I consider proper evidence for the jury to act upon, and the jury have found that it could not mean any thing else than shipment from the port of Gloucester or from the port of Liverpool. And I think the inquiry subsequently made on the part of the defendant clearly indicated that he considered the lead was ready for shipment at some *port*. For these reasons, I think the rule should be discharged.

ALDERSON, B.—I am of the same opinion. This was a contract for the delivery of 200 tons of Bog Mine lead, which, according to the terms of the contract, was deliverable in London. There is no specification in the contract as to the time when the delivery is to take place, and therefore the law would imply that the delivery should take place within a reasonable time; and it is a question for the jury at the trial, and this was the question put to them, how the *reasonable time*, which is an implied part of the contract, is to be ascertained. It seems to me the

correct mode of ascertaining what reasonable time is in such a case as this, is by placing the Court and jury in the same situation as the contracting parties themselves were in at the time they made the contract: that is to say, by placing before the jury all those circumstances which were known to both parties at the time the contract was made, and under which the contract itself took place. By so doing, you enable the Court and jury to form a safer conclusion as to what is the reasonable time which the law implies, and within which the contract is to be performed. Now, applying that principle to the present case, here is a contract for Bog Mine lead, sold by persons who deal in lead of that particular description. That would reasonably open for the plaintiff the inquiry what was the situation of the mine, and where the lead was usually found in a saleable state. Then the inquiry on the other side would be, what was the actual state of manufacture and situation of the lead, so that the buyer might judge within what time he would be likely to have it. The answer is, it is ready for shipment. What is the meaning of the term? It turns out that the usual place of shipment is Gloucester or Liverpool. I should therefore understand the meaning to be, "I have lead either at Gloucester or Liverpool in a situation to be shipped." The jury were in possession of these facts, and they are to judge; and I think they might reasonably be required to say, upon the evidence they had heard, that this meant lead ready to be put on board a ship at Gloucester or Liverpool, and so to be carried by sea to London, and therefore that the reasonable time was that which would be occupied in the voyage to London from the more distant of these two places. It seems to me that the verdict was right, and the case was correctly left to the jury. Then it has been said the negotiation between the parties, which has been referred to, as to the freight and insurance, ought to have altered the view which the jury

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took of the case. It seems to me, however, that that rather confirms the defendants' case: the meaning of it appears to be—"I am ready to take the lead either at Liverpool or Gloucester, at which it may happen to be;" but afterwards the party says, "I will not engage to ship from Gloucester or Liverpool, but you must do what you originally undertook to do." I think being "ready for shipment," means being ready at one or other of these two places: it seems to me that is clearly the meaning to be put upon it. For these reasons, I think there ought to be no new trial.

Lord ABINGER, C. B.—My brother *Parke* desired me, before he left the Court, to say that he concurred in the opinion the Court have given.

Rule discharged.

PUGH v. ROBERTS.

Trespass for breaking and entering the plaintiff's house, and assaulting the plaintiff. Pleas, 1. not guilty; 2. that the dwelling-house in which, &c., was not the dwelling-house of the plaintiff; and issues thereon. Verdict for the plaintiff, damages one farthing:—*Held*, that the plaintiff was entitled to full costs, without a certificate under the stat. 22 & 23 Car. 2, c. 9, s. 136.

TRESPASS for breaking and entering the plaintiff's dwelling-house and stable, and making a disturbance therein, and assaulting the plaintiff. Pleas, first, not guilty; secondly, as to breaking and entering the dwelling-house and stable, &c., that they were not, nor was either of them, at the time when &c., the dwelling-house or stable of the plaintiff: on which issues were joined. At the trial before *Williams, J.*, at the last Merionethshire assizes, the plaintiff recovered a verdict on both issues, damages one farthing. The Master, on taxation, having allowed the plaintiff no more costs than damages,

Jervis obtained a rule to shew cause why the Master should not tax the plaintiff his full costs, citing *Purnell v. Young (a)*.

(a) *Ante*, 291.

N. Clarke shewed cause.—The plaintiff was entitled to no more costs than damages. Before the new rules, if the plea of not guilty had been pleaded alone, the plaintiff would not have been entitled to full costs, without a certificate under the stat. 22 and 23 Car. 2, c. 9, s. 136. The two pleas here pleaded amount together to the old plea of not guilty, which would have put in issue both the trespass and the possession. The second plea is no denial of the *freehold or title* in the land; and the statute of Charles does not apply unless the freehold or title is *chiefly* in issue. [*Parke, B.*—Possession is title against a wrong-doer. We decided in *Purnell v. Young* that this plea is a denial of title; if so, must it not bring the title in question, so as to prevent the operation of the statute of Charles? It only shows the extreme folly of putting such a plea on the record in such cases.] The question is, whether the word *title*, as used in the statute, and coupled with *freehold*, can have so limited a construction.

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PARKE, B.—Yes; the defendant denies the plaintiff's title to the premises; a denial of the close being the plaintiff's is really a denial of the plaintiff's title to the close. The consequence is, if the defendant chooses to plead such a plea, he must pay the costs of trying it.

The rest of the Court concurred.

Rule absolute.

Jervis and *Welsby* appeared in support of the rule.

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MILLS v. STEPHENS.

Trespass for breaking and entering the plaintiff's house and distraining his goods.

Plea, as to the breaking and entering, leave and licence; as to the residue of the declaration, not guilty.

Verdict for plaintiff, damages 6*d.*:—*Held*, that the Judge might certify under the 43 Eliz. c. 6, as to deprive the plaintiff of costs.

TRESPASS for breaking and entering the plaintiff's dwelling-house, and distraining his goods. The defendant pleaded, as to the breaking and entering, leave and licence; as to the residue of the declaration, not guilty. At the trial the plaintiff had a verdict, with sixpence damages, and the judge certified, under the stat. 43 Eliz. c. 6, to deprive the plaintiff of costs.

Butt now moved for a rule to shew cause why the Master should not tax the plaintiff his full costs, notwithstanding the certificate. The plaintiff, succeeding on these issues, would have been entitled to full costs under the stat. 22 & 23 Car. 2, c. 9, s. 136, without a certificate: *Purnell v. Young* (a). The Master acted on the authority of *Smith v. Edwards* (b), where it was held, that on such a record as the present, when the case is taken out of the statute of Charles, it falls within the statute of Elizabeth. The question however is, whether the present case is not within the exception in that statute, being an action personal, and, so far as appears on the face of the declaration, "for a title or interest of lands." It is brought for disturbing the plaintiff's possession of his land. [*Parke, B.*—That argument amounts to this, that the statute applies to no case of trespass to land.] The question is, whether the Court is to look to the issues raised on the record. On the face of the declaration it certainly is an action relating to title, that is, to the possession.

PARKE, B.—The question depends entirely on the issues raised on the record; *Wright v. Piggin* (c), *Purnell v.*

(a) Ante, p. 291.

(b) 4 Dowl. P. C. 621.

(c) 2 Y. & J. 544.

Young. Here neither of the issues necessarily raises any question of title; the defendant might have done so under a general plea of not guilty, but he did not, and therefore the judge had a right to certify.

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The other Barons concurring,

Rule refused.

CURTEIS v. KENRICK.

THIS was a case sent by the Vice-Chancellor for the opinion of this Court.

By indentures of lease and release, dated on or about the 22nd and 23rd days of April, 1832, the release being made and duly executed between and by Anne Catherine Wykeham Martin, since deceased, late the wife of the said Richard Fiennes Wykeham Martin, by her then name and description of Anne Catherine Mascall, spinster, one of the three surviving daughters and co-heiresses of Robert Mascall, Esq., deceased, by Martha Mascall his wife, of the first part; the said Richard Fiennes Wykeham Martin of the second part, William Waterman, Esq., and Richard Curteis Pomfret, gent., of the third part, and Francis James Newman Rogers and Charles Wykeham Martin, Esq., of the fourth part; being the settlement made previous to the marriage of the said Richard Fiennes Wykeham Martin with the said Anne Catherine Wykeham Martin, which was afterwards solemnized: in consideration of the then intended marriage, she the said Anne Catherine Wykeham Martin, with the privity of the said Richard Fiennes Wykeham Martin, did grant, bargain, sell, and release the undivided third part or share of the said Anne Catherine Wykeham Martin, (the whole into three equal parts or shares being divided), of and in the

A married woman had power, under her marriage settlement, to appoint certain lands to uses by her last will and testament, "signed and published in the presence of, and attested by, three or more credible witnesses." The reversion in the same lands, subject to certain life estates, was also vested in her. She made a will, containing a devise of all her property real and personal, but not referring to the power. The attestation stated the will to be signed, sealed, and delivered by the testatrix in the presence of three witnesses, whose names were subscribed:—*Held*, that the will

was a due execution of the power.
Delivery is equivalent to *publication* of a will.

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several manors, messuages, farms, lands, and tenements therein particularly described, unto the said Francis James Newman Rogers and Charles Wykeham Martin, in their actual possession then being, to hold the same to them, their heirs and assigns, to the uses thereafter expressed; (that is to say) after the solemnization of the said then intended marriage, to the use of the said Francis James Newman Rogers and Charles Wykeham Martin, their heirs and assigns, during the joint lives of the said Richard Fiennes Wykeham Martin and Anne Catherine Wykeham Martin, (without impeachment of waste), upon trust to pay one moiety of the rents and profits thereof to or for the separate use of her the said Anne Catherine Wykeham Martin, and to pay the remaining moiety of the said rents and profits unto the said Richard Fiennes Wykeham Martin, or as she should in manner therein mentioned appoint; and after the decease of such one of them the said Richard Fiennes Wykeham Martin and Anne Catherine his wife as should first depart this life, to the use of the survivor of them the said Richard Fiennes Wykeham Martin and Anne Catherine his wife, and his or her assigns, during his or her life, without impeachment of waste, with remainder to the use of the said Francis James Newman Rogers and Charles Wykeham Martin, their heirs and assigns, during the life of such survivors, in trust to preserve contingent remainders, with remainder to the use of the children of the said Richard Fiennes Wykeham Martin by the said Anne Catherine Wykeham Martin his wife, for such estates and in such shares and interests as therein mentioned; with remainder in default of such issue, if the said Anne Catherine Wykeham Martin should survive the said Richard Fiennes Wykeham Martin, to the use of her the said Anne Catherine Wykeham Martin, her heirs and assigns for ever; but if the said Anne Catherine Wykeham Martin should die in the lifetime of the said Richard Fiennes Wykeham Martin, then to such uses,

upon and for such trusts, intents, and purposes, and with, under, and subject to such powers, provisoes, and conditions, as the said Anne Catherine Wykeham Martin, notwithstanding her coverture, by her last will and testament in writing, or by any codicil or codicils thereto, by her *signed and published in the presence of and attested by three or more credible witnesses*, should direct or appoint; and in default of such direction or appointment, and so far as any such direction or appointment should not extend, to the use of the said Anne Catherine Wykeham Martin, her heirs and assigns for ever.

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The intended marriage between Richard Fiennes Wykeham Martin and Anne Catherine Mascall was duly solemnized, and Anne Catherine Wykeham Martin, formerly Anne Catherine Mascall, died some time in or about February, 1833, without issue by the said Richard Fiennes Wykeham Martin, having first made and published her last will and testament in writing, or a paper writing purporting to be her last will and testament, of the date and in the words and figures following (that is to say) :—

“ I, Anne Catherine Wykeham Martin, do hereby make my last will and testament, and do give and bequeath to my dearly beloved husband, Richard Fiennes Wykeham Martin, *all the property of which I am possessed, whether real or personal*, and also my reversionary interest or interests in any property or properties whatsoever; and I hereby nominate and appoint Francis Newman Rogers, Esq., to be my executor. Signed, sealed, and *delivered*, this 3rd day of December, 1832, in presence of

“ ANNE CATHERINE WYKEHAM MARTIN.

“ JAMES WHATMAN, Surgeon, Maidstone, Kent.

“ FRANCIS ANNE KENRICK, Bowine Place, Kent.

“ ELIZABETH BONHAM.”

The question for the opinion of the Court is, whether the testamentary instrument of the 3rd day of December,

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1832, is a due execution of the power given to Anne Catherine Wykeham Martin by her marriage settlement.

The case was argued in Hilary Term by

W. H. Watson, for the plaintiff.—First, this power was not well executed, the formalities required by the settlement not having been complied with. There are several classes of cases on this subject. Where the instrument is required to be executed by writing “under the hand and seal” of the party, and the attestation has been in the words “*sealed and delivered* by,” &c., this, it has been clearly settled, is an invalid execution of the power: *Wright v. Wakeford* (a), *Doe d. Mansfield v. Peach* (b), *Doe d. Hotchkiss v. Pierce* (c), *Wright v. Barlow* (d). Here, the requisition of the power being that the will shall be “signed and *published* in the presence of, and attested by, three credible witnesses,” the attestation contains only the words “signed, sealed, and *delivered*.” The question is, whether “delivered” is of itself equivalent to “published.” In *Moodie v. Reid* (e), *Gibbs, C. J.*, expresses a difficulty as to the meaning of the term *publication*:—“I do not know what the publication of a will is; I can only suppose it to be that by which a person designates that he means to give effect to a paper *as his will*.” In conformity with that definition, the attestation here ought either to have contained the express word “published,” or else some words importing that the testatrix delivered the instrument *as her last will*. It might be delivered as a deed, and might not be known to the witnesses that it was a testamentary instrument. The word “published” is not to be found in the Statute of Frauds, but has been introduced in the case of wills made under powers. And the word “delivery,” as to a

(a) 4 Taunt. 213; 17 Ves. 454.

(d) 3 M. & Selw. 512.

(b) 2 M. & Sel. 576.

(e) 7 Taunt. 361. See 54 Geo. 3,

(c) 6 Taunt. 402.

c. 168.

will, is as much unknown to the law as "publication." A deed passes out of the hands of the party who delivers it to another; but the "delivery" of a will might be satisfied by the parties going into a private room and there saying, "I deliver this as my act and deed." The case in which the question, what amounts to publication, most ordinarily arises in legal proceedings, is with regard to libels. That, in civil cases, means the communication of the libellous document to a third party. So, an award is not considered to be published until it is not only made, but the parties have notice that it is ready for delivery: *Musselbrook v. Donkin* (a), *M'Arthur v. Campbell* (b), *Potter v. Newman* (c). The analogies furnished by these cases, so far as they go, are in favour of the plaintiff. In *Moodie v. Reid* (d), stock was limited to such persons as a woman should by her last will, or by any writing or appointment in the nature of a will, to be by her signed and published in the presence of and attested by two credible witnesses, appoint; an appointment by will was thus made:—"These are my last bequeaths, signed by me this 4th February, 1812. S. M. Witness, B. H. and J. H." The testatrix told each of the witnesses that the paper was her will. It was held that this was not a good execution of the power. *Ward v. Swift* (e) will be cited and relied upon on the other side, but it is in truth rather in favour of the plaintiff. There the will was required to be *duly executed and published* under the hand and seal of the party, in the presence of and attested by three credible witnesses. The testatrix signed and sealed the will, and the attestation expressed that it was signed, sealed, and delivered *as her last will and testament*. This was held a sufficient execution. It was there argued that publication was something different from delivery; to that argument

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(a) 9 Bing. 605; 2 Scott, 740.

(b) 2 Nev. & M. 444; 5 B. & Adol. 518.

(c) 2 C. M. & R. 742.

(d) 7 Taunt. 355; 4 Madd. 566.

(e) 1 C. & M. 171.

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Bayley, B., answers—"Supposing that publication does mean something more than a mere delivery, you do not take the whole of the expression; it is *as her last will and testament*." Those words shew that the party declared his intention to execute the power by will, and that the witnesses attest that declaration. So, in *Doe d. Spilsbury v. Burdett (a)*, where there was a declaration in the body of the will, that the testatrix "published and declared it to be her last will and testament," it was held to be a good execution of a power requiring that the will should be signed, sealed, and published in the presence of, and attested by, three witnesses, although the attestation itself contained only the word "witness," and the names of the witnesses. [*Parke, B.*—That case is sub judice in the Court of Error.] In *Stanhope v. Reid (b)*, where the will was to be signed and published in the presence of and attested by three or more credible witnesses; and the will concluded—"This is my last will and testament, made and signed by, &c., [being signed and sealed by the testatrix], in the presence of A. B., C. D., E. F.:"—Sir *John Leach, V. C.*, said he could not assume more from the attestation than that the witnesses saw the testatrix *sign* the will, and held the execution invalid. The same learned Judge afterwards decided, in *Buller v. Burt (c)*, that the word "witnesses," without more, used in the attestation, affirms that all has been done in the presence of the witnesses which is stated in the body of the instrument, but no more. The general result of all these authorities is, that the formalities annexed by the donor to the exercise of the power, whatever they are, must be strictly observed; and that the attestation is, in this respect, as much a part of the appointment as any other part of the instrument. [*Parke, B.*—There is one case you have not referred to,

(a) 4 Ad. & Ell. 1; 6 Nev. & M. 259.

(c) Cited 4 Ad. & Ell. 16; 6 Nev. & M. 281.

(b) 2 Sim. & Stu. 37.

that of *Lempriere v. Valpy* (a), before the present Vice-Chancellor.] That case is not a distinct authority on this point, because there the power did not require that the witnesses should make any written attestation at all. Unless simple delivery be held equivalent to publication, this was an insufficient execution of the power, which imposes a further guard beyond those required by the Statute of Frauds.

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Secondly, this devise being general, and not referring in terms to the power, did not operate as an appointment in execution of the power. There are no words devising this specific estate, nor in any manner indicating that the testatrix was acting in virtue of the power. [*Parke, B.*—She could not make a will at all except under the power.] In *Denn v. Roake* (b), where A., seized in fee of one moiety of premises in the County of S., and tenant for life with power of appointment by deed or will, of the other moiety, devised *all his freehold estates* in L. and in the county of S. to B. for life, on condition that out of the rents thereof he should keep such estates in repair, it was held in the House of Lords that this devise did not operate as an execution of the power, but passed only the moiety of which the testator was seised in fee, and which was sufficient to answer the devise. *Alexander, C. B.* there states the result of the authorities thus:—"In no instance has a power or authority been considered as executed, unless by some reference to the power or authority, or to the property which was the subject of it, or unless the provision made by the person entrusted with the power would have been ineffectual—would have had nothing to operate upon, except it were considered as an execution of such power or authority." [*Parke, B.*—This case falls within that last class; it cannot be intended that the testatrix had other property which she could devise, being a married woman.]

(a) 5 Sim. 108.

(b) 6 Bing. 474.

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In *Lovell v. Knight* (a), a married woman, having power to appoint leaseholds and stock, by her will, executed and attested as required by the power, but not referring to it, gave to her husband "the whole of her property, both real and personal, and whatsoever she might possess at her decease:" and this was held not to be an execution of the power. [*Parke, B.*—Did it appear that there was other property on which the bequest could operate?] There was; but the Vice Chancellor did not put the case on that ground, but that, being in terms a will passing the general property of the testatrix, it could not be deemed an execution of a power comprising only certain specific property.

Hodgkin, contra.—With regard to the latter point, the authority of *Alexander, C. B.*, cited from *Denn v. Roake*, is decisive in favour of the defendant. Here the character of the party executing—her being a married woman—supplies the last requisite stated by the learned judge, because, as to real estate, she could make no will at all except under the power. *Lovell v. Knight* is not inconsistent with this conclusion; for, in the first place, that case had reference to *personal* estate, and the terms of the will, "the whole of my personal property," were sufficient to pass property, not only then possessed, but subsequently acquired, and settled to the separate use of the testatrix; whereas all appointments and powers must be of specific application: secondly, the whole argument in favour of the will being a good execution of the power was rested on this—that chattels real might pass as real property. Here the subject of the devise *is* real property. It is to be observed, also, that the propriety of the decision in *Lovell v. Knight* has been questioned by Sir *E. Sugden* (b), who refers to Lord *Hardwicke's* authority in *Churchill v. Dibbin* (c), as sanctioning the doubt. In that case,

(a) 3 Sim. 275.

(b) 1 Sugd. Pow. 419, 424.

(c) 2 Lord Kenyon, 68.

although the testatrix had general personal estate, yet specific lands included in a power were held to pass by a general residuary devise (after devises of specified portions of them) of "all her goods, chattels, and estates undisposed of," on the ground that the instrument could not operate as a will, by reason of the coverture, and therefore must rather be taken as being *altogether* an execution of the power. The residuary devise in that case corresponded with the general appointment in the present. If the testatrix *had* other property, it must either be property devisable under a power, or something—as the reversion in fee here—which could not pass at all.

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Then, as to the first point. It may be admitted, that unless it sufficiently appears that the will has been in fact *published*, and that *publication* has been attested, the power is not well executed; since, however unreasonable or capricious the requisitions of the power, they must be performed, and must be attested. But, first, there was a publication in fact, for the *delivery* here amounted to it. In *Trimmer v. Jackson* (a), where the testator delivered the will *as his act and deed*, thereby deceiving the witnesses, and leading them to believe that the instrument was a deed and not a will; and the words "sealed and delivered" were put above the place where the witnesses were to subscribe, this was held a sufficient execution of the will under the Statute of Frauds. And *Lempriere v. Valpy* is a distinct authority that the production and delivery of the will to witnesses, in order that they may attest it, are equivalent to a publication, where that is required by a power. The power in that case certainly did not in terms require an attestation, and therefore cannot be quoted as an authority that the *attestation* in this case was sufficient: although it is to be observed, that the proof of a *publication* was deducible only

(a) 4 Burn's Eccl. Law, 130.

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from the terms of the attestation. The cases cited on the other side are no authorities against the defendant; in all of them the very thing required to be attested has been wanting. The present is rather a question of verbal interpretation than of law: the Court is to put a rational construction upon the word "delivered," with reference to the particular instrument to which it applies. If, in executing a deed, the party were to say "I *publish* this deed," would not that be a sufficient delivery? So, if a testator, having signed and sealed his will, says, "I deliver this," or, "I deliver this as my will," in either case the ratifying act of the mind being clearly indicated, the particular technical term is to be implied from the nature of the instrument. Secondly, the terms of the 54 Geo. 3, c. 168, which was passed in order retrospectively to supply certain defects in the attestations of instruments, made in exercise of powers, supply a strong argument in favour of the defendant, as to the sufficiency of the attestation. The preamble states, that doubts had arisen respecting the validity of instruments requiring signature, of which the sealing and delivery only appeared to be attested, and that titles of persons claiming under them might be defective for want of the word "signed," or *some word to that effect*, in the memorandum of attestation. That is a legislative recognition that equipollent words may be used in the attestation; and the whole argument for the defendant here is, that the publication *is* attested, but alio nomine. *Ward v. Swift* was, no doubt, a stronger case than the present in favour of the validity of the execution, but the inclination of the Court clearly was to consider delivery equivalent to publication. And, in *Simeon v. Simeon (a)*, the Vice Chancellor unequivocally held that it was so.

(a) 4 Sim. 555.

Watson, in reply.—Unless the term *deliver*, in the case of a will, *ex vi termini* imports *publish*, this was an invalid execution. Many things would be a delivery of a *deed*, which would not be a publication of it. And in the case of a will, the reasonable interpretation of the term is, that the testator shall inform the witnesses that he is executing that document which the power contemplated. *Trimmer v. Jackson* arose on the Statute of Frauds, and every thing required by the terms of the statute had been done. In *Simeon v. Simeon*, it was not necessary to decide this point; and Sir *E. Sugden* (a) assumes that the will was there *duly acknowledged and delivered*, and that it was *that* delivery which was held to amount to publication. It is impossible to define what the mere delivery of a will is. [*Parke, B.*—Something whereby the party acknowledges that the instrument is a complete act containing his final mind—that it is no longer ambulatory.] As to the other point, *Churchill v. Dibbin* is distinguishable; it was there clear from the whole will that the testatrix intended to dispose of all the lands subject to the power.

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Cur. adv. vult.

In the present term, the judgment of the Court was delivered by

LORD ABINGER, C. B.—This was a case from the Court of Chancery, argued in this Court in Hilary Term last. The question turned upon the execution of a power by a married woman, given to her by her marriage settlement, to appoint to uses by her *last will and testament in writing*, or by any codicil or codicils thereto, *signed and published* in the presence of, and attested by, three or more credible witnesses. The will purported to be signed, sealed, and

(a) 1 Sugd. Pow. 311.

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delivered, by the testatrix, in the presence of three witnesses, whose names are subscribed to that declaration.

There were two objections urged to the due execution of this power. The first was, the want of the word *published* in the attestation. The second, that even if the word "delivered" were held to be equivalent to "published," it did not appear that the instrument was delivered as the last will and testament of the testatrix.

The law has given no definition of the meaning of the word *published*, when applied to a will. It certainly cannot mean that the whole contents of the will should be made known to the witnesses. If it mean any thing less than that, there is no reason why delivery should not be publication. Delivery is a publication, to those who are present, of the completion of the instrument, the signing and delivery of which they are called upon to attest. If this case, therefore, were original, we should be disposed to think that *delivery* was equivalent to publication. But there is sufficient authority to be found for this opinion. First, that of Lord Chief Justice *Gibbs*, in *Moodie v. Reid*; next, that of the Vice Chancellor, in the case of *Simeon v. Simeon*, and also in the case of *Lempriere v. Valpy*; and, last though not least, that of Lord *Lyndhurst*, and the other members of this Court, in *Ward v. Swift*.

Upon the second point, it appears to us that the act to be published is the execution of the instrument, and not the nature of it. The act of execution is not only to be in the presence of the prescribed number of witnesses who must see it signed, but is to be accompanied by some act or declaration in their presence, signifying that it has been completed. If, therefore, the word "published" would have been a sufficient description of the act done, without the addition of the words "as a last will and testament," so the word "delivered" equally denotes a publication, and requires no further addition.

Upon these grounds, we shall certify our opinion that the testamentary instrument stated in the case was a due execution of the power.

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A certificate was sent accordingly.

WEBB v. FAIRMANER.

ASSUMPSIT for goods sold and delivered. Plea, non assumpsit. At the trial before Lord *Abinger*, C. B., at the Middlesex Sittings after Hilary Term, it appeared that the action was brought to recover the price of certain goods sold by the plaintiff to the defendant on the 5th of October, 1837, "to be paid for in two months." The goods were delivered on the 9th. The writ in this action was issued on the 5th of December. It was contended for the defendant, that the period of two months ought to be calculated from the delivery of the goods; or, at all events, that the time ought to be computed exclusively of the day on which the contract was made; and the credit therefore had not expired when the action was brought. The objection was overruled, and the plaintiff had a verdict.

Goods were sold on the 5th of October, to be paid for in two months:—*Held*, that an action for the price could not be commenced until after the expiration of the 5th of December.

On a former day in this term, *R. V. Richards* obtained a rule to shew cause why there should not be a new trial on the latter ground of objection, the rule being refused on the former.

Platt and *Mansel* now shewed cause.—The rule laid down in the cases as to the computation of time, is, that where the computation is to be made from a certain *day*, that day is not to be included; but where it is from a particular *act done*, the day on which it was done is to be included. *Clayton's case* (a), *Rex v. Adderley* (b), *Glas-*

(a) 5 Rep. 1.

(b) 2 Dougl. 463.

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sington v. Rawlins (a), *Castle v. Burdett* (b), *Clarke v. Davey* (c). The case of bills of exchange stands on a different footing; they are regulated by a peculiar system, the usage and custom of merchants; and where a bill is payable a month after date, that means a month after the day on which the bill was dated. [*Bolland*, B.—In the case of a bill payable at *sight*, it has been decided over and over again that the holder cannot sue upon it until after the expiration of the third day after sight. *Parke*, B.—The case of *Clarke v. Davey* is in effect overruled by *Hardy v. Ryle* (d).] The act done here was the sale, until the completion of which no contract arose; and according to the authorities already cited, the computation is to be from that act, and must therefore include the day on which it was done. It is clear that the Courts will notice fractions of a day for some purposes; *Symons v. Lowe* (e), *Pugh v. Robinson* (f). [It was also urged, that in the absence of any evidence to shew the intention of the parties to the contrary, the two months must be taken to mean *lunar* and not *calendar* months, and *Jocelyn v. Hawkins* (g) was cited; but it appeared that the case had been discussed on both sides at the trial, on the assumption that they were calendar months, and the Court therefore refused to entertain this objection.]

R. V. Richards, in support of the rule.—There is no reported case which has decided how the time is to be computed in mercantile contracts for sale on credit; all the cases cited on the other side turned on the words of particular acts of Parliament. The authorities were all reviewed in *Lester v. Garland* (h), where it was laid down that there is no general rule of law, in computing time

(a) 3 East, 407.

(b) 3 T. R. 623.

(c) 4 Moore, 465.

(d) 9 B. & Cr. 603; 4 Man. & Ry. 295.

(e) Styles, 72.

(f) 1 T. R. 116.

(g) 1 Stra. 445.

(h) 15 Ves. 248.

from an act or an event, that the day is to be either inclusive or exclusive; but it depends on the reason of the thing, according to the circumstances. Sir *W. Grant*, M. R., there says:—"Upon the technical reasoning, I rather think it would be more easy to maintain, that the day of an act done, or an event happening, ought in all cases to be excluded, than that it should in all cases be included. Our law rejects fractions of a day more generally than the civil law does. The effect is to render the day a sort of indivisible point; so that any act done in the compass of it is no more referable to any one than to any other portion of it; but the act and the day are co-extensive; and, therefore, the act cannot properly be said to be passed until the day is passed." In accordance with this authority, the Court of Queen's Bench held, in *Rex v. Justices of Cumberland (a)*, that in the computation of the six days' notice which must be given to justices before suing out a certiorari to remove an order made by them, the day of giving the notice was to be excluded. So, in *Pellow v. Inhabitants of Wangford (b)*, the two days' notice required by the Riot Act, 9 Geo. 1, c. 22, to be given of the injury done, before an action can be commenced against the hundred, were construed exclusively of the first day. There the words are very strong—"within two days after such damage or injury done." The analogy derived from the rule as to bills of exchange is in favour of the defendant; and all convenience favours the same construction. The Courts have accordingly adopted it as to the computation of time in matters of practice, by the rule of H. T. 2 Will. 4, (viii).

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PARKE, B.—I think the rule ought to be absolute for a new trial: there cannot be a nonsuit, as this point was not reserved. As to the question whether the time should be

(a) 4 Nev. & M. 378.

(b) 9 B. & Cr. 134; 4 Man. & R. 130.

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computed by lunar or calendar months, I think it is not now open to the plaintiff to say that they were lunar months. The case was argued at the trial, on both sides, on the footing that they were to be taken as calendar months, and was so left to the jury. If that assumption be wrong, the plaintiff can set it right when the case goes down to a new trial; but I cannot help thinking that the fact was not so, and that there is no difference in this respect between what is called *close credit*, that is, on payment by bills, and the case of open credit. Assuming that they were calendar months, I think the action was prematurely brought. Whatever doubt there might have been upon the point before the decision in *Lester v. Garland*, since that case the rule appears to be that the time is to be calculated exclusively of the day on which the contract was made: the party is to have two entire calendar months in which to make payment, exclusively of the day of sale. The question was very much gone into by the Master of the Rolls, Sir *William Grant*, with whose observations I entirely concur. [His Lordship read the paragraphs before quoted.] That appears to me to be an extremely sound rule to lay down on the subject; and I think the earlier cases can be disposed of without breaking in upon that rule. *Rex v. Adderley* was ultimately decided on the ground that the statute, being in ease of sheriffs, should be construed favourably for them. As to *Castle v. Burditt*, it may be doubtful whether it can be considered law since the decision in *Hardy v. Ryle*: if a month is to be allowed, one can hardly suppose that the justices should not have a whole month within which to consider as to the tendering amends. That case, however, proceeded entirely on the authority of *Rex v. Adderley*, which, as I have said, was decided on a particular ground. Then, with regard to *Glassington v. Rawlins*, there is no doubt that there the party lay in prison on the day on which he went to prison, and that he lay in prison during a portion at least of each of the twenty-eight days; and it is

difficult to say that there should be a different rule in the case of lying in prison so as to commit an act of bankruptcy, and in that of a *sentence* of imprisonment, in which, in favour of liberty, the time is reckoned inclusively. The earlier cases, therefore, can all be distinguished. Then as to the cases since that of *Lester v. Garland*, they will all, I believe, be found to be cases in which the time was computed exclusively. *Hardy v. Ryle* is one of them, and there *Bayley, J.*, refers to and acts on the authority of *Lester v. Garland*, although perhaps some of the reasoning of the Court may not be quite satisfactory. So also, in *Pellew v. Inhabitants of Wonsford*, the time was held to be exclusive; and a very reasonable rule was laid down by Lord *Tenterden*, which is a very good test to apply, viz. by reducing the time to *one* day, in which case the party would clearly be entitled to the whole of the next day after the injury was done, otherwise he might have no time at all in which to give notice. So here, if the credit had been for one day, it is impossible to say that the defendant would not have the whole of the next day in which to make payment. If so, the same must be true of any number of days; consequently he had the whole of the 5th of December for that purpose. And although I admit that the rule as to bills of exchange is not conclusive, because it is founded on the law merchant, yet so far as it affords an analogy, it is in favour of this construction; the day on which the bill is dated would not be reckoned in the computation; and that being true of what is called close credit, appears to me to be so also in the case of open credit: and there can be no doubt that this is much the more convenient rule. For these reasons I am of opinion that the writ in this case was issued too soon, and that the defendant is entitled to a new trial.

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BOLLAND, B.—I am of the same opinion. It appears to me, independently of the cases, that the rule we adopt is

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by far the more convenient. I have always understood that the day of the contract was not to be considered as included, because thereby the seller has the whole day to deliver the goods, and the buyer the whole day to receive them. If a merchant goes into the warehouse of another on the first of January, and purchases goods at a month's credit, it is said that that day is to be included; but then if he proposes to give a bill at a month, he is to have a day longer for payment than in the other case. I think it is much more convenient that the same rule should apply to both.

ALDERSON, B.—I am of the same opinion. The rule laid down in *Pellew v. Inhabitants of Wonsford* is a very excellent criterion to apply, viz. to reduce the time to one day, and see whether you do not obtain an absurdity unless by excluding the first day. And you must have the same rule whatever be the number of days.

GURNEY, B., concurred.

The rule was therefore made absolute; but on the application of *Platt*, the plaintiff had leave to discontinue on payment of costs up to the time of the trial, each party paying his own costs of the trial.

CLARK v. DIGNAM.

Where an action was brought in the name of A. against B. on a bill of exchange, but it appeared that C., the drawer of the bill, was the real plaintiff, and that A. only lent his name because C. was unwilling that his should appear, and that A. gave no instructions to and had no communication with the attorney; and the attorney received a sum of money from B. on the settlement of that action:—*Held*, in an action for money had and received by A. against the attorney, to recover such sum, the jury having found that it was received for C. and not for A., that the plaintiff could not recover.

ASSUMPSIT for money had and received, and on an account stated. Pleas, first, non assumpsit; secondly, a set-off for the work and labour, &c. of the defendant for the plaintiff as his attorney. At the trial before *Gurney, B.*,

at the Middlesex Sittings after Hilary Term, it appeared that the defendant, who is an attorney of this Court, had acted as attorney for the plaintiff in an action brought (nominally) by the present plaintiff against a Mr. Duncombe on a bill of exchange, and had received from Mr. Duncombe a sum of 60*l.* on the settlement of that claim. After the present action was brought, the defendant delivered to the plaintiff, under a judge's order, a bill of costs in all the matters wherein he had been concerned for the plaintiff, and amongst them, in the cause of *Clark v. Duncombe*, which were taxed by the Master, and reduced from 4*6l.* 17*s.* 5*d.* to 26*l.* 7*s.* 7*d.*, without prejudice to the defendant's proving certain items disallowed by way of set-off. The defendant had also received a sum of 5*l.* from a defendant in another action brought by the plaintiff, but this was covered by proof of certain costs due from the plaintiff to the defendant. For the defendant, evidence was adduced to shew that the plaintiff had no interest whatever in the action against Mr. Duncombe; that one Edwards, the drawer of the bill, was the real plaintiff, but had induced the plaintiff to allow him to use his name, Edwards being unwilling to appear as plaintiff in an action on the bill, which he had received for a gaming debt: that the defendant received all his instructions from Edwards, and had no communication whatever with Clark, the plaintiff: that Clark had expressed his surprise at the present action being brought in his name, and said that he would desire it to be put an end to: and that Edwards owed the defendant a larger amount for business done for him. It was therefore contended, that the money received from Mr. Duncombe was money had and received to the use of Edwards, and not of the plaintiff, and that the present action could not be maintained. The learned judge left it to the jury to say whether the defendant received the 60*l.* on account of Clark or on account of Edwards, and the jury found that it was received for Edwards and not for Clark. The learned

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judge thereupon directed a verdict for the plaintiff for 40*l.* 15*s.*, (the amount not covered by the set-off), with liberty to the defendant to move to enter a verdict for him, if the Court should be of opinion that he had a right to avail himself of the defence set up on his behalf.

Kelly, having obtained a rule accordingly,

Platt (*Humfrey* with him) shewed cause.—There is no plea of payment on this record: the defendant does not say he has paid the money over to Edwards, but only that he keeps it in his own pocket, because Edwards owes him a larger amount. But that is not sufficient as against the plaintiff, who was his client on the record; he ought to have discharged himself by shewing payment to Edwards, for whose benefit he alleges the action was brought. [*Parke*, B.—No; it all arises on the general issue: the defendant disputes all the facts from which the legal inference arises that the money was money had and received to the use of the plaintiff. He says that Clark was a mere name on the record, and never employed him, and that Clark knew this; therefore the money is received to the use of Edwards and not of Clark.] The defendant having had his bill taxed as between him and Clark, it was not competent to him afterwards to dispute Clark's title to recover as the plaintiff in the case.

PARKE, B.—Can you put the case higher than this—that *primâ facie* the defendant was the attorney for Clark, the plaintiff on the record; but when the case goes to the jury, there is evidence for them that the party really employing him was Edwards, and that the money was received for him and not for Clark? On this evidence the defendant could not have sued the plaintiff for his costs. An agent cannot dispute his principal's title—but then it appears that Edwards was in fact the principal here. And

that does not contradict any thing; it does not contradict the record: if the fact be as the jury have found it, there is no rule of law which prevents the defendant from paying the money over to Edwards, and so discharging himself as against the plaintiff.

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The rest of the Court concurred.

Rule absolute to enter a verdict for the defendant.

Kelly and *Barstow* appeared in support of the rule.

MIZEN v. PICK.

DEBT for board and lodging, &c. supplied to the wife of the defendant. Plea, *nunquam indebitatus*.

The cause was tried at the Palace Court under a writ of trial, when it appeared that the defendant was living in adultery with another woman, apart from his wife, and it was proved that the plaintiff had supplied her with board and lodging. The defence was, that she had received from him a sufficient sum for her maintenance, which was proved to have been paid. It was objected for the plaintiff that there was no evidence that the plaintiff had had notice of the separate allowance, but the learned judge was of opinion that notice was immaterial; and the jury having found that the maintenance paid was sufficient, he nonsuited the plaintiff, with leave to move to enter a verdict for 20*l*.

Where a husband, living apart from his wife, allows her sufficient for her maintenance, he is not liable for necessaries supplied to her, and notice to the tradesmen of that allowance is immaterial, and need not be given.

Locke now moved to set that nonsuit aside, and to enter a verdict for the plaintiff for the sum of 20*l*., the amount of the board and lodging proved at the trial. *Rawlyns v.*

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Vandyke (a), is an authority that it is incumbent on the husband to shew that the tradesman had notice of the separate allowance of the wife. There Lord *Eldon*, C. J., says—"If the husband gives express notice to a tradesman not to trust his wife, he shall not be charged for goods furnished to the wife: and if a tradesman has notice of a separate maintenance given to the wife, it is the doctrine of Lord *Holt* that that shall be notice of an express dissent on the part of the husband, and he shall not be charged; but where the tradesman's demand is for necessities, it is incumbent on the husband to shew that the tradesman knew of the separate maintenance." [*Alderson*, B.—No doubt, according to that decision, notice would be necessary, but the question is, whether Lord *Eldon* meant to express what the reporter has made him say. In *Hindley v. The Marquis of Westmeath* (b), nothing is said as to the necessity of notice.] *Locke* also urged that it did not appear from the evidence that the maintenance extended over the whole period during which the board and lodging were supplied.

BOLLAND, B.—The objection as to the sufficiency of the evidence was not made at the trial, and it is now too late to raise it. As to the necessity of notice, the Court think that the case in *Espinasse* is not a sufficient authority to support such a doctrine. The rule must therefore be refused.

ALDERSON, B.—The plaintiff was nonsuited upon a supposed state of facts, which, if not the true state, should have been corrected and set right at the time. It is the duty of the counsel to point out any deficiency in the evidence, if the Judge has overlooked it. The Judge stated it as his opinion that the payment of a separate maintenance

(a) 3 Esp. 250.

R. 351, S. C.; 1 Dow. & Clark,

(b) 6 B. & Cr. 200; 9 D. &

519.

nance, if sufficient, would be an answer to the action, and the jury found that it was sufficient. It was assumed then, and cannot be disputed now, that the payment of the maintenance extended over the whole period out of which the plaintiff's claim arose. The question therefore is, whether the law laid down by the judge is correct. I think it is: I do not see how notice to the tradesman can be material, The question in all these cases is one of authority. If a wife living separate from her husband is supplied by him with sufficient funds to support herself—with every thing proper for her maintenance and support, then she is not his agent to pledge his credit, and he is not liable.

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GURNEY, B., concurred.

Rule refused (a).

PATRICK v. COLERICK.

TRESPASS for breaking and entering the plaintiff's close, and with feet in walking, &c., and with horses, &c., and with the wheels of carts, &c., subverting the soil, and seizing and carrying away divers large quantities of straw, &c.

Third plea.—As to entering the close of the plaintiff in which, &c., and with feet in walking, &c., and with the said horses, &c., and with the wheels of the said carts, &c., a little tearing up, subverting, and damaging the earth and soil of the said close, the defendant says that the plaintiff ought not to maintain his aforesaid action thereof against him, because he says that he, the defendant, just before the said time when, &c., was lawfully possessed as of his own property of divers, to wit, ten cartloads of straw; and the defendant being so possessed thereof, the plaintiff did then with force and arms, &c., and without the leave or license, and against the will of

A plea to a declaration in trespass for breaking and entering the plaintiff's close, that the defendant being possessed of certain goods, the plaintiff, without his leave and against his will, took the goods and placed them on the close in the declaration mentioned, wherefore the defendant made fresh pursuit, and entered to retake the goods, is a good plea, and a good justification of the entry on the plaintiff's close.

(a) See *Hodgkinson v. Fletcher*, 4 Campb. 70.

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the defendant, seize and lay hold of the said last mentioned straw, and wrongfully carry away the same, and put and place the same upon the said close in the said first count mentioned, in which, &c., and wrongfully detained it therein until the said time when, &c., wherefore the defendant at the said time when, &c., made fresh pursuit after his said straw, and then quietly and peaceably entered the said close in the said first count mentioned, in which, &c., and with the said horses, mares, geldings, and waggons in the introductory part of this plea mentioned (the same then being necessary and proper for that purpose) in order to retake his said straw, and did then and there quietly and peaceably retake his said straw, and load the same upon the last mentioned waggons, and carry the same away from and out of the said close in the said first count mentioned, in which, &c., as he lawfully might for the cause aforesaid, doing no unnecessary damage to the plaintiff.

Demurrer, and joinder in demurrer.

F. V. Lee, in support of the demurrer.—This plea is bad. In *Anthony v. Haney* (a), where, in trespass for breaking and entering the plaintiff's close, the defendant pleaded that he was the owner of a certain barn, three outhouses, and three lean-tos, and divers goods and chattels, to wit, ten bricks, &c. then standing and being in and upon the close of the plaintiff, in which, &c., wherefore he entered to pull down, remove, and take them away; it was held that the plea was bad, as not shewing how the barn, &c., came upon the plaintiff's close. [*Parke, B.*—In this plea it is stated that the plaintiff took the defendant's property and placed it upon his own close; in *Anthony v. Haney*, it does not appear who placed the barn, &c. on the plaintiff's close.]

(a) 8 Bing. 186; 1 M. & Scott, 300.

It must be admitted that that case is distinguishable from the present upon the facts stated, but the reason of the judgment will apply to this case: the plea ought to shew the circumstances under which the entry was made, and that they were such as could not lead to a breach of the peace. There *Tindal*, C. J., cites the following passage from Blackstone's Commentaries (a):—"As the public peace is a superior consideration to any one man's private property, and as, if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease; the strong would give law to the weak, and every man would revert to a state of nature; for these reasons it is provided that this natural right of recaption shall never be exerted, where such exertion must occasion strife and bodily contention, or endanger the peace of society. If, for instance, my horse is taken away, and I find him in a common, a fair, or a public inn, I may lawfully seize him to my own use; but I cannot justify breaking open a private stable, or entering on the grounds of a third person to take him, unless he be feloniously stolen; but must have recourse to an action at law."

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PARKE, B.—The passage in Blackstone, as to the right of recaption, applies to the case where the goods are placed on the ground of a third party. All the old authorities say, that where a party places the goods upon his own close, he gives to the owner of them an implied license to enter for the purpose of recaption. There are many authorities to that effect in Viner's Abridgement. Thus, in title "Trespass," (1) a., it is said, "If a man takes my goods and carries them into his own land, I may justify my entry into the said land to take my goods again; for they came there by his own act." The reason of the judgment of the Court

(a) Vol. 3, p. 4.

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of Common Pleas is, that it was not shewn who placed the goods there; and that the mere fact of the defendant's goods being on the plaintiff's land is no justification of the entry, unless it be shewn that they came there by the plaintiff's act.

LORD ABINGER, C. B., BOLLAND, B., and ALDERSON, B., concurred.

Judgment for the defendant.

FISCHER v. AIDE.

In *assumpsit*, the first count was on an agreement whereby the defendant engaged the plaintiff as courier for five months certain, at ten guineas a month, and agreed, in case she discharged him before the end of the five months, to pay him the fifty guineas and his expenses back to Paris or England; and the count, after averring that the plaintiff served the defendant

two months, and was ready and willing to serve for the remainder of the five months, alleged as a breach that the defendant refused to continue him in her service, and dismissed him before the end of the five months, and refused to pay him the fifty guineas, or any sum towards his expenses back. There was another count for £24. 10s. for wages as the defendant's hired servant. The defendant pleaded, 1st, as to the first count, except as to 21*l.*, parcel, &c., that the plaintiff wrongfully quitted her service; 2nd, as to the first count, except as to the said sum of 21*l.*, that she dismissed him for improper conduct; 3rd, as to the second count, except as to 21*l.* parcel, &c., *non assumpsit*; and 4th, payment into Court of 34*l.* 18s., in the form given by the new rules for a plea of payment into Court on the whole declaration. Replications, joining issue on the first and third pleas, *de injuriâ* to the second, and to the fourth damages *ultra*. At the trial, the jury found for the plaintiff on the first issue, and for the defendant on the second and third:—*Held*, that the plaintiff was entitled to judgment on the whole record, at least for nominal damages.

ASSUMPSIT.—The first count of the declaration stated, that heretofore, to wit, on the 17th of May, 1837, by an agreement then made between the plaintiff and the defendant, the defendant engaged the plaintiff as courier and travelling servant, for five months certain, at the rate of ten guineas a month; and agreed, in case she the defendant should discharge the plaintiff before the end of the five months, to pay him the fifty guineas, and the expenses of his journey back to England or Paris: and the plaintiff agreed to serve the defendant with faithfulness, and to do his best and his utmost for the comfort of the defendant and her suite. The declaration then averred mutual promises, and alleged that the plaintiff, in pursuance of the said agreement, entered into the service of

the defendant, and continued therein, upon the terms of the said agreement, for two months, and that he was ready and willing to remain in her service for the remainder of the said term of five months: Breach, that the defendant would not continue the plaintiff in her service upon the terms in the said agreement mentioned, but wholly refused so to do; on the contrary thereof, she the defendant, after the plaintiff had served and travelled with the defendant from England to Carlsbad, and before the expiration of the term of five months, to wit, on the 17th of July, 1837, at Carlsbad, in Bohemia, dismissed and discharged the plaintiff from her service, and then wholly refused to employ him any longer: and the defendant refused to pay the plaintiff the said sum of fifty guineas, or to pay him any sum or sums of money whatever for or towards the expense of his journey back from Carlsbad to England or to Paris, contrary to her said agreement and promise, and the plaintiff necessarily and unavoidably incurred and was put to great expense of his monies, amounting in the whole to 30*l.*, about his journey from Carlsbad to Paris, whereof the defendant had notice, &c. &c.

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The second count was *indebitatus assumpsit* for 52*l.* 10*s.*, for wages as the hired servant of the defendant and on her retainer.

Pleas, first, as to the first count of the declaration, except as to the sum of 24*l.*, parcel of the said sum of 52*l.* 10*s.* in the said first count mentioned, *actionem non*, because the plaintiff, during the said term of five months, to wit, at the said time when, &c., that is to say, on the said 17th day of July, 1837, wrongfully and improperly absented himself from, and quitted and left the said service and employ of the defendant, without her consent, and did not at any time afterwards, and during the remainder of the said term of five months, return to the defendant's service, or render her any service; and thenceforward until the expiration of the said term of five months, wrongfully and

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improperly absented himself from the service and employ of the defendant without her consent, although the defendant, during all that time, was ready and willing to receive and continue the plaintiff in her service and employ upon the terms aforesaid, of which the plaintiff had notice; without this, that the defendant dismissed or discharged the plaintiff from her service, or refused to employ him any longer, as in the said first count mentioned: concluding to the country.

Second plea, as to the first count, except as to the said sum of 21*l.* parcel, &c., *actionem non*; because the defendant says, that the plaintiff did not nor would, while he was such servant of the defendant and continued in her service as aforesaid, serve the defendant with faithfulness, or do his best or utmost for the comforts of the defendant and her suite, as he ought to have done, and the plaintiff from time to time during that time, and before his said dismissal, neglected and refused so to do, and wilfully and obstinately refused to obey divers lawful and reasonable demands and orders of the defendant by her to him given as such servant, and which he ought to have obeyed as such servant in the capacity aforesaid, and used disrespectful, insolent, and improper language, and behaved in an insolent manner towards the defendant, so then being his employer as aforesaid, and in divers respects misbehaved and misconducted himself, and neglected his duties as such servant, until just before the said time when he was dismissed as aforesaid; and by reason thereof the plaintiff's services became and were of little or no use or value to the defendant, and it became and was necessary to her comfort, &c. that the plaintiff should be dismissed from her service: wherefore the defendant, during the term of the said five months, and before the wages of the plaintiff for the last three months of the said term became due, dismissed and discharged the plaintiff from her service, and refused to employ him any longer, as she lawfully might for the causes

aforesaid, being the supposed breach of promise, &c. Verification.

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Third plea, to the second count of the declaration, except as to 21*l.*, parcel of the sum of 52*l.* 10*s.* therein mentioned, non assumpsit.

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Fourth plea, payment into Court (in the form given by the new rules as applied to the whole declaration) of the sum of 34*l.* 18*s.*

The plaintiff joined issue on the first and third pleas, and replied to the second, *de injuriâ*, and to the fourth damages ultra, on which replications also issues were joined.

At the trial before *Parke*, B., at the London Sittings after last Hilary Term, the plaintiff had a verdict on the first and fourth issues, and the defendant on the second and third; but leave was reserved to the plaintiff to move to enter a verdict for the plaintiff, for such sum as the Court should think fit; it being contended that by the plea of payment into Court, the defendant had admitted a contract for a stipulated amount of fifty guineas, and a breach of that contract.

Bompas, Serjt., having accordingly obtained a rule to shew cause why the verdict should not be entered for the plaintiff, either for the sum of 17*l.* 12*s.* or 7*l.* 2*s.*, or for nominal damages,

Erle (*A. K. Watson* with him) now shewed cause.— Under the first count, supposing the discharge lawful, the plaintiff would be entitled to recover the sum of 21*l.* He could not claim to recover another 21*l.* also on the second count; for there is no admission on the record of *two different* sums of 21*l.* being due. Had there been no plea of payment into Court, the plaintiff would have obtained judgment for 21*l.* only, not for 42*l.* The Court will take notice of the fact that different sums may be claimed in different indebitatus counts, though one only is due:

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Jourdain v. Johnson (a). The admission, as applied to an indebitatus count, is not an admission of the precise sum stated, but of so much as may be proved, not exceeding that sum. All that the defendant does is to except the two sums of 21*l.* out of her good answer to the rest of the declaration, until she comes to the plea of payment into Court. It is the same as if there had been judgment for want of any answer as to those two sums; then the question would have been whether they were or were not one and the same; if they were, the plaintiff would not be allowed to recover both, although there were two counts claiming them separately. [*Parks*, B.—The meaning of the pleas to the first count is only this—"for some part of the five months in the first count mentioned, you, the plaintiff, are entitled to recover; as to certain monthly payments, not more than two, I offer no answer." Then the plea to the second count, in like manner, merely admits that some wages are due, not exceeding 21*l.* But then comes the difficulty as to the plea of payment into Court. The plaintiff contends, that if there were no plea but that on the record, he would be entitled to the difference between 34*l.* 18*s.* and 52*l.* 10*s.* on that plea, as further damages.] The plea of payment into Court is in effect pleaded to that part of the declaration which was left unanswered before. Suppose the first plea to the first count struck out, the whole of the other three might be taken as one plea to the whole declaration; they would have constituted a good plea before the statute of Anne. In *Harvey v. Graham* (a), where one plea commenced with a general allegation of actionem non, but contained matter expressly confined to the first count, concluding with a verification and prayer of judgment whether the plaintiff ought to have or maintain "his aforesaid action thereof;" and the record then went on thus—"And as to the second count" &c., with matter expressly confined to the second count,

(a) 2 C. M. & R. 564.

(b) 5 Ad. & E. 61.

and verification and prayer of judgment as before; it was held that the first part was a plea pleaded to the first count only, though informally, and was good on demurrer. Here the pleader's intention clearly was to plead the last plea only as to the parts before unanswered, and the question is, whether it is bad, because in form it applies to the whole declaration. This plea being given by the rules of the Judges, may be considered as relieved from some of the strictness of form required in pleas pleaded at the discretion of the parties: it might, perhaps, have been ground of special demurrer. The plea is an admission of the contract, and of the breach, to the extent of the money paid into Court, and no more. In *Finlayson v. Mackenzie* (a), which was debt against the acceptor of a bill of exchange for 78*l.* 13*s.* 6*d.*, the defendant pleaded payment into Court of 5*l.* 3*s.* 6*d.*, and that he was not indebted beyond that sum, on which the plaintiff joined issue; and it was held that it was competent to the defendant, under that plea, to make any defence applicable to the plea of nil debet, although the plea would have been bad on special demurrer. That case is an authority, that notwithstanding the partial admission by the plea of payment into Court, the defendant may shew that the plaintiff was not entitled to recover any thing at all. So, in *Reid v. Dickons* (b), it was held that payment of money into Court on a promissory note payable by instalments, was only an admission that money to the amount paid in was due on the note, and did not bar the Statute of Limitations as to a further sum claimed to be due upon it. *Parke, J.*, there says: "The payment of money into Court admits the contract as alleged, and a right to recover 110*l.*; but beyond that sum every defence is open." [*Parke, B.*—Under the old rule, could you have proved payment after action brought under the general issue, except in mitigation of damages? Supposing such payments

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(a) 3 Bing. N. C. 824; 5 Scott, 20.

(b) 5 B. & Adol. 499.

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proved to the full amount of the balance beyond the sum paid into Court, the only effect would be to reduce the verdict to nominal damages.] The defendant admits the truth of the allegations in the declaration necessary to enable the plaintiff to recover the specific sum admitted to be due:—viz. that the plaintiff was engaged by the defendant, that he served her two months, and that he is entitled to 21*l.* for wages. [*Alderson, B.*—Do not you admit a contract for five months certain, at ten guineas a month? Suppose the plaintiff properly discharged, would he have a right to recover *any thing* under the first count? *Parke, B.*—The substance of the complaint in the first count really is the improper discharge of the plaintiff before the end of the five months. Could he have recovered under the first count, on non assumpsit pleaded to it before the new rules, without having proved an unjustifiable discharge?] The count, it is submitted, discloses a good cause of action for the two months for which the plaintiff actually served, even though they had parted by consent. [*Parke, B.*—I believe we are all agreed that we must treat this plea of payment into Court as a plea to the whole declaration. Then comes your next point, that it only admits that the plaintiff is entitled to recover something on the first count, and that that count enables him to recover for the two months he actually served. But if so, you must treat it as a count with two breaches—one for the non-payment for the two months, the other for non-payment for the five, by reason of the improper discharge: but money paid into court on a count with a double breach admits that something is due on both. My present opinion, however, is that the plaintiff only means to complain of one breach, viz. his improper discharge before the end of the five months for which he was engaged, because the count contains no averments necessary to be proved to enable him to recover for the two months.] At all events, these are inconsistent pleas,

and the Judge was not bound to direct the jury to find separately on each, but they might look from one plea to the other, in order to fix the amount of damages; and it being proved that the plaintiff was dismissed for justifiable cause, and therefore that no damages at all were due, on the one plea, the learned judge was not bound to direct a verdict for the plaintiff on the other. The plaintiff refers to the jury how much he has been damaged, at the same time that he refers to them the question whether he was properly discharged. The jury may take both questions into consideration together. [*Parke, B.*—If there had been only non assumpsit, and this plea of payment into Court, I should have agreed that the defendant was entitled to judgment, because there would be a complete answer to the declaration on the first issue; but here there is no complete answer without going to the plea of payment into Court: then if that be taken alone, as it must be, the plaintiff is entitled on it to a balance of 17*l.* 12*s.* *Alderson, B.*—Although the pleas are inconsistent, there is no one plea that goes to the whole declaration.]

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v.
ALDER.

The plaintiff's counsel having agreed to accept nominal damages,

PARKE, B. said—The Court all agree in the view already thrown out—that, whether there be a plea of payment into Court or not, each issue must be tried by itself. If the plaintiff chooses to leave inconsistent pleas on the record, no doubt he must take the consequences; but if they remain, it is the duty of the judge and the jury to try each by itself. Now here the second plea, (which is the first under discussion), raises an issue on the whole of the first count, except as to a sum not exceeding 2*l.*; that issue being, whether the plaintiff was dismissed for justifiable cause, by reason of his disobedience of orders. That issue is disposed of in favour of the defendant; but

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1838.

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v.
AIDE.

that leaves an undefined portion of the first count unanswered. The next issue applies to the second count, except as to an undefined portion of the plaintiff's claim, not exceeding 21*l.*; that also is found for the defendant. Then we come to the fourth plea, which purports to answer the whole declaration, by payment into Court of a sum of 34*l.* 18*s.* If this were the only issue on the record, the plaintiff would be clearly entitled to recover something beyond the sum paid into Court. On the true construction of the first count, the real cause of complaint is for the discharge of the plaintiff without justifiable cause before the end of the period for which he was engaged. The defendant, by payment into Court, admits that the contract was as alleged in that count; and then she puts the defence on the ground that the discharge was justifiable. But even if I am wrong in this construction of the first count, and it can be considered as stating a claim for payment during the time the plaintiff actually served, then it contains also a double breach—for the non-payment of the wages for that time, and for the unjustifiable discharge; and if so, the defendant, by paying money into Court, admits that something is due on each of those breaches; and in either view the plaintiff is entitled to recover more than the 34*l.* 18*s.*, because this is an agreement for a stipulated sum for a stipulated time, and the damages for the breach of it are fifty guineas. The record is then in this state—an undefined portion of each of the first and second counts, not exceeding 21*l.* on each, is left unanswered: then taking the payment into Court to meet that undefined amount, it reduces the plaintiff's claim to nominal damages.

BOLLAND and ALDERSON, Bs., concurred.

Rule absolute to enter a verdict for
the plaintiff for 1*s.*

Bompas, Serjt., and *Humfrey*, appeared in support of the rule.

1838.

**TWENLOW and Others v. ASKEY and Another, Assignees
of WEBSTER, a Bankrupt.**

ASSUMPSIT. The declaration stated, that before the making of the agreement thereafter mentioned, the plaintiffs were possessed of a certain stone quarry, and on &c., agreed with Webster, before his bankruptcy, to permit him to take therefrom such quantities of stone as he might require, for the purpose of building a certain church which he had undertaken to build, at a certain price, to wit, &c.; and that Webster, before he became bankrupt, agreed to pay for the same; and that, in pursuance of the said contract, he did take therefrom divers large quantities of stone for the said purpose, and was indebted to the said plaintiffs for the same in the sum of 50*l*., which sum was still due and owing to the plaintiffs. The declaration then stated that Webster afterwards became a bankrupt, and the defendants were chosen his assignees, and that at the time he so became a bankrupt, the church which he had contracted to build was unfinished; and that the defendants, after they became such assignees, adopted the said contract of Webster to build the said church, and agreed to continue and to fulfil the contract made by Webster and the plaintiff, and thereby, as assignees as aforesaid, became and were liable to and bound by all the equities which Webster stood under with respect to the said contract, and one of which equities was to pay to the plaintiffs the said sum of 50*l*. for the said stones which he had so taken from the said quarry of the plaintiffs, and applied to the building of the said church; and thereupon afterwards, in consideration that the plaintiffs would permit the defendants, as assignees, to take

Declaration in assumpsit, against assignees of a bankrupt, stated that the plaintiff had agreed with the bankrupt, before his bankruptcy, to permit him to take stones from the plaintiff's quarry at a certain price, for a church which he, the bankrupt, had undertaken to build, and that he took therefrom stones to the amount of 50*l*.; that the defendants, as his assignees, adopted his contract for building the church, and thereby became bound by its equities, and so liable to pay the plaintiff the 50*l*.; and that afterwards they took from the quarry stones for the same purpose to the amount of 40*l*. Plea, as to the agreement of the plaintiff with the bankrupt, non assumpsit; as to the residue of the causes of

action, payment into court of 8*l*. 12*s*. 11*d*.; which the plaintiff accepted in satisfaction of that sum. The jury having found for the defendants on the first issue:—*Held*, that the admission in the plea of payment into court did not entitle the plaintiff to have a verdict entered for him on the other issue.

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1838.

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vs.
ASHTON.

such quantities of stone from the said quarry as would be necessary for completing the contract so adopted by them; they promised to pay the plaintiff the said sum of 50*l.* for the stone taken by Webster before he became a bankrupt, and also for such quantities of stone as they, as assignees, should thereafter take for the purpose of building the said church and completing the said contract. Averment—that they took from the quarry a certain quantity of stone, to wit, &c., and became liable to pay for the same the sum of 25*l.*, which, together with the aforesaid sum of 50*l.*, amounted to the sum of 75*l.* in the whole. Breach—non-payment of the same or of any part thereof.

Pleas—First, as to the said causes of action, so far as they relate to the supposed promise first mentioned, and whereby it is alleged that the defendants, as assignees, promised to pay for the said quantities of stone taken by Webster, to wit, the sum of 50*l.*, non assumpsit. Second, as to the residue of the causes of action, payment into Court of the sum of 6*l.* 12*s.* 11*d.* Replication thereto, acceptance in satisfaction of that sum.

At the trial before *Alderson*, B., at the last assizes for the county of Stafford, the jury found for the defendant on the issue raised by the first plea.

R. V. Richards, in this term, obtained a rule to shew cause why that verdict should not be set aside, on the ground that the payment of money into Court upon one breach admitted the whole contract alleged in the declaration, and that the finding of the jury on the first issue, which negatived that contract, was a finding inconsistent with the admission on the record, and ought not therefore to be allowed to stand. He cited *Dyer v. Ashton* (a).

Upon the case coming on for argument, on the day following the decision in the foregoing case of *Fischer v.*

(a) 1 B. & Cr. 3.

more than evidence of payment, and cannot be used without a plea of payment. The defendant, therefore, was obliged to plead the payment of the 10*l.*, and that plea is wholly unanswered. He was consequently entitled to sign judgment of non pros. *Topham v. Kidmore* (a) is expressly in point for the defendant.

Arch. of Pleas,
1838.

EMMETT
v.
STANDEN.

Les, contra.—According to the distinction which appears to be taken by the Court in *Coates v. Stevens*, the plea of payment was unnecessary. [*Parke, B.*—This plea of payment into Court is irregular in form, but in truth it proposes to answer only the amount of 10*l.* 13*s.* The plaintiff has brought all the difficulty on himself, by claiming 65*l.* when the debt was only 22*l.* 11*s.* 6*d.* If he does not choose to dispose of the other pleas on the record, the defendant is entitled to judgment of non pros. as to the part unanswered.] The defendant ought to have resisted the taxation of costs by the plaintiff.

PER CURIAM.—Upwards of 50*l.* of the 65*l.* claimed in the declaration is left unanswered, the payment into Court applying only to the 10*l.* 13*s.* Then the plea of payment answers part of that sum, and the plea of *nunquam indebitatus* the rest. If the plaintiff does not choose to go down to trial as to those pleas, the defendant is entitled to judgment of non pros. He could not resist the taxation of costs, because the plaintiff was entitled to costs in respect of the payment into Court. The result is, the judgment is regular. The case differs from *Coates v. Stevens*, because there the plea of payment into Court applied to the whole declaration: but it exactly resembles *Topham v. Kidmore*.

Rule discharged.

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COOPER v. MORECRAFT.

In debt, the defendant cannot give in evidence, even in mitigation of damages, under a plea of *nunquam indebitatus* or set-off, money payments made by him to the plaintiff.

DEBT in the sum of 5*l.*, on an I. O. U. dated the 12th of January, 1838, and in 5*l.* on an account stated. The plaintiff's particulars claimed only 5*l.* The defendant pleaded, as to all the sum demanded but 5*l.*, *nunquam indebitatus*; as to 5*l.*, a set-off for work and labour, money paid, &c. The particulars of set-off amounted to the sum of 5*l.* 2*s.* 6*d.*, and contained an item of 2*l.* for cash paid to the plaintiff, and another of 15*s.* for cash paid to a third party on account of the plaintiff. At the trial before the under-sheriff of Middlesex, the plaintiff having proved the I. O. U., evidence was tendered on behalf of the defendant, of the several items of set-off, and amongst them of the above payments. This evidence was objected to on the part of the plaintiff, as not being admissible without a plea of payment; and *Belbin v. Butt* (a) and *Ernest v. Brown* (b) were cited. The under-sheriff, however, admitted the evidence; and proof was accordingly given of the payment by the defendant to the plaintiff himself of a sum of 2*l.* some time before the commencement of the action, and of a sum of 15*s.* for him to a third party. It was not specifically shewn on what account the 2*l.* was paid, but the plaintiff attempted to elicit the fact that it was in discharge of a gaming debt. The under-sheriff, in summing up, told the jury that they must give the defendant the benefit of the money payments, unless they thought they were made for a gambling consideration; and the jury found for the defendant.

Busby having obtained a rule nisi for a new trial, on the ground that the evidence of payment was improperly

(a) 2 M. & W. 422.

(b) 3 Bing. N. C. 674; 4 Scott, 385.

admitted, and that the under-sheriff had misdirected the jury upon it,

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1838.

COOPER
v.
MORNCRAFT.

Hughes now shewed cause.—The cases cited at the trial do not apply. As to one of the items, the 15s., evidence of that was clearly admissible under the plea of set off; and, with regard to the 2*l*., it did not appear that it was such a payment as required a plea of payment to let in evidence of it. That plea does not amount merely to an allegation of payment to the plaintiff, but of payment to him and acceptance by him in satisfaction, pro tanto, of the cause of action: both those averments, the payment and the acceptance in satisfaction, being material and traversable. Here, it did not appear that this money was paid to the plaintiff in satisfaction of any part of this debt; the contrary is to be inferred from the fact that the plaintiff still claimed the whole 5*l*. in his particulars, as an entire debt. It might have been paid on a consideration which failed, or on an illegal consideration.

PARKE, B.—The only question is, whether, under a plea of *nunquam indebitatus* or a plea of set-off, you can give evidence of money payments to the plaintiff. The cases referred to are authorities that you cannot. The money must be taken, *prima facie*, as paid in satisfaction of the debt due from the party paying it.

ALDERSON, B.—You never prove more, under the plea of payment, than the fact of payment by the one party to the other.

Rule absolute.

Book of Pleas,
1838.

MAUDE v. NESHAM and Another.

Assumpsit for money paid. Plea, as to 500*l.*, parcel, &c., actionem non, because the defendants say that heretofore, to wit, on the 11th of January, 1836, they were possessed of a certain bill of exchange theretofore drawn by the defendants upon, and accepted by one Mason, whereby they required Mason to pay to their order 500*l.*, six months after the date thereof, and thereupon, in consideration that the defendants would indorse and deliver the said bill to the plaintiffs, the plaintiffs promised and agreed with the defendants to lend to, or pay, lay out, and expend for the defendants the sum of 500*l.*, from time to time, in such sums and in such manner as the defendants should thereafter require or direct, and to hold and retain the bill of exchange, for and on account and as payment of the said sum of 500*l.*; and the defendants further say, that they did indorse and deliver the said bill to the plaintiffs, and the plaintiffs then took and received the same from the defendants, and still hold the same for and on account and as payment of the said sum of 500*l.*, so agreed to be lent or paid, laid out, and expended, for the defendants as aforesaid; and the defendants say that the sum of 500*l.* parcel &c., in the introductory part of the plea mentioned, is composed and made up of divers sums of money lent to, and paid, laid out, and expended for the defendants on account of the bill, and in pursuance of the said promise and agreement. Verification:—*Held*, on special demurrer, that the plea was bad, as amounting to the general issue.

THIS action was brought by the plaintiff, as one of the public officers of the Darlington Joint Stock Banking Company. The declaration was in indebitatus assumpsit in the sum of 3,000*l.* for money paid for the defendants; in 150*l.* for interest; in the sum of 110*l.* for work and labour; and in the sum of 3,000*l.* for money found to be due upon an account stated. Pleas, first, non assumpsit, except as to 215*l.*; secondly, payment of 500*l.* parcel, &c.; thirdly, as to 500*l.*, parcel of the said sum of money in the first count of the declaration mentioned, actionem non, because the defendants say that heretofore, to wit, on the 11th day of January, 1836, they, the defendants, were possessed of a certain bill of exchange, theretofore drawn by the defendants upon and accepted by one Christopher Mason, whereby they required the said Christopher Mason to pay to the order of them, the defendants, 500*l.*, six months after the date thereof; and thereupon, on the day and year last aforesaid, in consideration that the defendants would indorse and deliver the said bill of exchange to the said company, the said company then promised and agreed to and with the defendants, to lend to, or pay, lay out, and expend for the defendants the sum of 500*l.*, from time to time, in such sums, and in such manner, as the defendants should thereafter require or direct, and to hold and retain the said bill of exchange, for and on account and as payment of the said sum of 500*l.*; and the defendants in fact

further say, that they the defendants did then accordingly indorse and deliver the said bill of exchange to the said company, and the said company then took and received the same of and from the defendants, and still hold the same, for and on account and as payment of the said sum of 500*l.* so agreed to be lent to, or paid, laid out, and expended for the defendants, as aforesaid; and the defendants say, that the said sum of 500*l.* parcel, &c., in the introductory part of this plea mentioned, is composed and made up of divers sums of money lent to, and paid, laid out, and expended for the defendants on account of the said bill of exchange, and in pursuance of the said promise and agreement.

Verification.

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v.
NEWMAN.

To this plea the plaintiff demurred, shewing the following causes of demurrer, viz.:—For that the defendants have not, in or by the said third plea, traversed or confessed and avoided the matter and cause of action to which the same plea is pleaded, and no certain and material issue can be taken thereon; and also, that the said third plea is an argumentative plea, and not a direct traverse or denial of the same matter and cause of action, and amounts to the general issue that the defendants did not promise, and concludes with a verification instead of to the country; also, that the plea does not sufficiently or at all confess that the defendants ever became indebted in the said sum of 500*l.* in the introductory part of that plea mentioned, or promised to pay the same to the company on request; and also that no date is given or stated when the said sum of 500*l.* was lent, paid, laid out, or expended, or that it was so after the making of the agreement, or the indorsement of the bill; nor is it alleged, nor does it appear in or by the plea, that the bill has been paid or satisfied, or is over due, or that 500*l.* was ever satisfied or discharged by the said bill; and also, for that there is no proper conclusion or prayer of judgment to the said third plea, although the

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same is pleaded to a part only of the cause of action in the first count mentioned.

W. H. Watson, in support of the demurrer, was stopped by the Court, who called upon

S. Temple to support the plea.—This plea does not amount to the general issue. If there be a single moment when the defendant is indebted to the plaintiff, that is sufficient, and raises the implied assumpsit to pay upon request. The plea alleges that upon each advance of money the plaintiff was to retain and apply the bill to the payment of it. There must, therefore, be a moment between the advance of the money and the application of the bill to the payment of it, and that was sufficient to raise the assumpsit.

PER CURIAM.—The declaration is for money paid, laid out, and expended for the defendants at their request; but the sum of money mentioned in the plea is not payable on request. No action could have been brought whilst the bill was running, and it does not appear by the plea that it was due. There never was a time when the money could be recovered upon request. The plea is therefore bad, and amounts to the general issue.

Judgment for the plaintiff.

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HUCKMAN v. FERNIE, Managing Director of the British Commercial Insurance Company.

ASSUMPSIT on a policy of insurance.—The declaration stated that the plaintiff, on the 23rd of October, 1833, caused to be made a certain policy of insurance, whereby, after reciting that the plaintiff, having an interest in the life of Elizabeth Huckman his wife, was desirous of making an insurance with the company, in the sum of 300*l.* upon the life of the said Elizabeth Huckman, and had declared that she did not exceed the age of fifty-one years on the 28th of March then last; that she had had the small pox or cow pox, had not had the gout, had not had a spitting of blood, and was not afflicted *with any disorder which tended to shorten life, and that she had led and continued to lead a temperate life.* The declaration then went on to state the making of the policy, which contained a proviso, amongst other things, that *if any thing stated by the plaintiff, either in the declaration or attestation thereinbefore mentioned to have been made by him, should not be true*, the policy should be null and void, and the monies paid on account of the insurance should be forfeited. The declaration then alleged mutual promises, and averred performance by the plaintiff of all things in the policy on his behalf to be performed—that he was interested in his

In an action on a policy of insurance effected by the plaintiff on the life of his wife, the declaration averred that the plaintiff had made statements, (*inter alia*), that the wife was not afflicted with any disorder which tended to shorten life, and that she had led, and continued to lead, a temperate life. The defendant pleaded, that before the making of the policy, and on divers times after that day, the wife had been and was afflicted with certain disorders, maladies, or diseases, to wit, delirium tremens and erysipelatos inflammation of the legs,

all which the plaintiff before and at the time of the making of the policy well knew. It appeared that at the time the policy was effected, the wife had been examined at the insurance office, and answered several questions put to her, but did not apprise the company of her having been affected with those complaints. The jury found that the plaintiff had not any knowledge of her having had these disorders:—*Held*, that upon the issue raised on these pleadings, the wife not being the general agent of the husband to effect the policy, but only sent to answer particular questions, her knowledge was not in this respect the knowledge of the husband.

The wife had for several years been attended by A. B. up to her marriage with the plaintiff, and nearly to the time when the policy was effected. After her marriage, C. D., the medical attendant of her husband's family, had, on one or two occasions, when called in to the other members of the family, prescribed for her for a cold or some trifling matter. In answer to the question put to her at the office, "who is your usual medical attendant?" she replied, C. D.:—*Held*, that the learned Judge ought not to have left it to the jury, on this evidence, to say which of the two was her usual medical attendant, but whether C. D. could be called her usual medical attendant at all.

Where, upon a question whether the plaintiff or defendant has a right to begin, the Judge at nisi prius has decided clearly and manifestly wrong, the Court will grant a new trial.

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wife's life to the amount of the monies insured thereon—and that the declaration or attestation in the policy mentioned, and so by him made, was in all respects true. It then proceeded, in the usual form, to allege the death of Mrs. Huckman, the payment of the premiums, &c. &c. Pleas—First, that the declaration or attestation in the policy mentioned was not true, because at the time the same was made the said Elizabeth Huckman was afflicted with a disorder which tended to shorten life. Secondly, that the said declaration or attestation in the said policy mentioned, and so made by the plaintiff as therein stated, was not true, because at the time the same was made as aforesaid the said Elizabeth Huckman *had not led, nor did she continue to lead, a temperate life.* Thirdly, that before the making of the policy of insurance in the said first count mentioned, to wit, on the 1st of January, 1828, and on divers times after that day, the said E. Huckman, deceased, had been and was afflicted with certain disorders, maladies, or diseases, to wit, delirium tremens, and erysipelatous inflammation of the legs, and her legs had been and were ulcerated, and she had been and was, on various occasions, and from time to time, as well long before as shortly before the making of the said policy, seriously ill, *all which the plaintiff before and at the time of the making of the said policy well knew, which were facts material and necessary to be known to the said company* before the making of the said policy, to enable them rightly and adequately to estimate the risk to be by them incurred in the event of their making the said policy of assurance, and for their due security in that behalf; and the defendant further says, that the said plaintiff, before and at the time of making the said policy, wholly neglected and omitted to apprise and inform the said company of the said last mentioned several facts, and the same were not, nor was either of them, at any time before the making of the said policy of insurance, in any manner communicated to the

said company, but the said company were, at the time of the making of the said policy, wholly ignorant of the same, and by reason of the said premises, and of the non-communication of the said last mentioned facts by the plaintiff to the said company as aforesaid, the said policy was and is wholly null and void—Verification. The fourth plea alleged, in the same manner, that Mrs. Huckman had been in the habit of taking spirits in excessive quantities; and the fifth plea stated that the company were induced to enter into the policy, and that the policy was effected, by fraud and covin. The defendant pleaded sixthly, that before the granting of the insurance and making of the policy, to wit, on &c., the said company caused to be delivered to the plaintiff, and he received from them, a certain document or instrument in writing, containing and requiring divers questions to be answered, and matters to be stated in writing by the plaintiff, and to be then signed by the plaintiff and returned to the said company, one of such questions and matters being, "Who was the usual medical attendant of the said E. Huckman?" and the said company then declined to make the policy until such questions and matters were answered and stated by the plaintiff, the said document being material in reference to the state of health of the said E. Huckman, whereof the plaintiff then had notice; and the defendant says that thereupon he, the said plaintiff, in answer to the said questions and requisition, in reference to the name of the usual medical attendant of the said E. Huckman, afterwards, to wit, on &c., answered and stated in writing in the said document, that Mr. E. Day, surgeon, Bristol, was the usual medical attendant of the said E. Huckman, and the plaintiff then signed the last mentioned document, and returned the same to the company, and thereby then declared and agreed that the said plaintiff's said declaration and answers, and matters therein stated by the plaintiff, should be the basis of the

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contract for the said insurance, and that he had not omitted or concealed any matter material to be known to the assurers: and the defendant further saith, that the said company, confiding in the truth of the said answer and matter so stated by the plaintiff, and believing the same to be true, the same being material in that behalf, then made the said policy in the declaration mentioned as aforesaid: whereas in truth and in fact the said E. Day was not the usual medical attendant of the said E. Huckman, as stated in the said document by the plaintiff as aforesaid, but a certain other person then living had been and was her usual medical attendant, wherefore the said policy was and is void in law.—Verification—To the count on the account stated, the defendant pleaded the general issue. The plaintiff took issue on the first and second pleas, and replied *de injuriâ* to the third, fourth, and sixth pleas; on which issues were joined.

At the trial before *Tindal*, C. J., at the Bristol Summer Assizes, 1837, it appeared that in the year 1833 the plaintiff effected the insurance in question, at which time he sent his wife to the office of the company, and she attended the board, and answered several questions which were then put to her, but as they did not apply to the particular causes of illness stated in the third plea, but were merely answers given to printed questions, the company were not apprised of her having been affected with those complaints. It appeared in evidence, upon the sixth plea, (as to who was the usual medical attendant of Mrs. Huckman), that she had married the plaintiff, who was a butcher in Bristol, in 1832, having been previously residing as a widow in Bristol. In 1829 she had been attacked with severe erysipelatous inflammations in the legs, when a surgeon of the name of Duck was called in to attend her, as he also did in 1830, when she was attacked with delirium tremens, under which she continued in a very dangerous state for some weeks. Mr. Duck had subsequently retired from

business. Mr. Day, who was an apothecary in Bristol, it appeared, had never attended Mrs. Huckman before her marriage, but had been in the habit of attending Mr. Huckman's family, and in answer to questions put to him by the directors, he stated that he had never attended her professionally; but that on one or two occasions when he had not been called in to attend her expressly, he gave her some prescription for a cold, but of which he had made no entry or memorandum in his books. Upon this evidence, the learned Chief Justice left it to the jury to say whether the husband had a knowledge of the fact of his wife's having had the erysipelas or delirium tremens, and also who was the usual medical attendant of Mrs. Huckman. The jury found that Mr. Day was her usual medical attendant in 1833, and that her husband had not any knowledge of the erysipelas or delirium tremens. At the commencement of the cause, the learned Chief Justice had decided that the plaintiff was entitled to begin. A verdict having been found for the plaintiff, *Crowder*, in the following term, obtained a rule to shew cause why there should not be a new trial, on three grounds: 1st, That the learned Judge had decided improperly in allowing the plaintiff to begin. 2ndly, that his lordship had misdirected the jury in telling them that, in order to support the averment in the third plea, of concealment, they must be satisfied that the plaintiff was himself aware of the fact that his wife had had erysipelas or delirium tremens; for that the wife having been sent by him to the office as his agent, her knowledge of it ought to be considered as equivalent to knowledge by him. 3rdly, That it ought not to have been left to the jury, on the above evidence, whether Duck or Day was the wife's usual medical attendant in October, 1833, for that the evidence shewed that Day could not be considered her usual medical attendant at all. In this term,

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Bompas, Serjt., shewed cause.—The question who is

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the party to begin is a matter in the discretion of the Judge at Nisi Prius, under the circumstances of the case, and the Court in banc will not interfere with the exercise of that discretion. But here the learned Judge has properly decided that the issue was upon the plaintiff, and having imposed the burthen upon him, of which he did not complain, the defendant has no right now to complain of it. The affirmative of the issue as to whether the wife led a temperate life or not, was clearly upon the plaintiff. [*Alderson, B.*—The real criterion is, whether the averment in the declaration, that she did lead a temperate life, is necessary to make the declaration good.] The declaration would have been bad if it had not contained that averment; it is a conditional agreement; one of the conditions of the policy is, that she led a temperate life, and the plaintiff must aver performance of those conditions. [*Lord Abinger, C. B.*—The plaintiff must give some evidence that the life was in an insurable state. Before the new rules that must have been shewn under the general issue, and when an issue is now taken upon it, the plaintiff must equally prove it.] If the averment cannot be struck out as immaterial, and the defendant takes issue upon it, the plaintiff must give some evidence in support of it. But even if the defendant had a right to begin, the Court would not grant a new trial solely on that ground: *Burrell v. Nicholson* (a). There the Court said, “that they doubted whether, under any circumstances, a new trial ought to be granted, on the ground that the Judge at Nisi Prius had come to an incorrect decision relative to the right of beginning. It seemed rather a matter of practice and regulation for the presiding Judge to exercise his discretion on, than one which the Court in banc were to determine as a matter of law.” [*Alderson, B.*—That is rather a large proposition. Suppose a Judge at

(a) 1 M. & Rob. 304.

Nisi Prius were to determine that the defendant was always to begin, and thus give him the advantage of a reply in every case, could not the Court in banc interfere to set it right? Lord *Abinger*, C. B.—You say that in this instance the Judge was right in deciding that the plaintiff ought to begin; but that if not, this Court has no jurisdiction to inquire into it. I think, on the first part of the proposition, you may succeed, but not on the other.] No new trial has ever been granted on such a ground. [*Alderson*, B.—There are cases where the Judges have decided that the defendant has a right to begin, as in libel, where permitting him to begin may be a great advantage to him. The Court of Common Pleas, in a case where there has been an improper amendment allowed at Nisi Prius, have interfered to set it right. Lord *Abinger*, C. B.—The Court at present think that the Chief Justice was right in deciding that the plaintiff ought to begin. You had better proceed to the other points.]

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Secondly.—It is averred in the third plea that the plaintiff's wife had been afflicted with delirium tremens and erysipelas, and had been seriously ill, and that the plaintiff knew it, but wholly neglected and omitted to inform and apprise the company of those facts. That question was left to the jury, and they have found that he did not know it. [*Alderson*, B.—The question is, whether the plea would not have been good without the averment of knowledge?] They say on the other side, that the knowledge of the wife is the knowledge of the husband, and it was not left to the jury whether the wife knew it or not.] There was no evidence that the wife ever knew she had had delirium tremens. She knew that she had been ill, but that was immaterial. Unless she knew it was delirium tremens, it amounts to nothing. Suppose the plea had raised an issue whether she had had that specific disease, and had not communicated it to the office; there being

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no evidence that she ever knew it, the Judge ought not to have left that question to the jury. So as to the erysipelas, it was not shewn that it was ever communicated to her that she had had that disease, and it could only be proved that she knew it by proving that it was communicated to her. [Lord Abinger, C. B.—There is, besides, no plea here to raise that point.] Under the old rules of pleading, the defendant might have falsified the policy by shewing many things under the general issue, but here he was limited to the precise issue. The defendant ought to have pleaded specially the matter as it really was, in order that issue might be taken upon it. The knowledge of the wife is not the knowledge of the husband. It is not like the cases where a party is a general agent for all purposes: here the wife was only the agent of the husband for the purpose of answering the particular questions put to her. *Maynard v. Rhodes* (a) and *Everett v. Desborough* (b) will perhaps be relied upon, but those were cases before the new rules, and are, besides, clearly distinguishable from the present case. In *Maynard v. Rhodes*, the declaration alleged that Col. Lyon, the life insured, had himself subscribed and delivered into the Pelican office a declaration setting forth his ordinary and then state of health; and that such declaration *did set it forth truly*, and was part of the consideration for the defendants' entering into the contract (c). That case is therefore quite beside the question, as the plaintiff there took upon himself to aver that the declarations of the life assured, touching his health, were true. In *Everett v. Desborough*, the party whose life was insured was the agent of the assured for making the particular declaration. And in *Sweet v. Fair-*

(a) 5 D. & R. 266.

(b) 5 Bing. 503.

(c) The form of the declaration is not given in the report in Dow-

ling & Ryland, but is stated in the argument of *Wilde*, Serjt., in *Everett v. Desborough*, 5 Bing. 512.

lie (a), it was held, that though the party was the agent of the assured for making the declaration, yet it must be shewn that she knew that she had been afflicted with a disorder tending to shorten life, in order to make the non-communication of it vitiate the policy.

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Thirdly. It was a question for the jury, whether, at the time of effecting the policy, Mr. Day was or was not the usual medical attendant of Mrs. Huckman. It appeared in evidence that Mr. Duck had been her medical attendant during her former husband's life, and had attended her on some occasions previously to his death, and once afterwards; but that he had for some time prior to 1833 given up practice, and gone to reside two miles out of Bristol. Mr. Day had been for many years the medical attendant of Mr. Huckman's family. The meaning of the question put by the company, "Who is your usual medical attendant?" is, who is your ordinary medical attendant at the time? Mr. Day had occasionally prescribed for her, and though it did not appear that she had had much occasion for medical attendance since her marriage, yet if she had had occasion, Mr. Day was the person who would have attended her. In *Morrison v. Muspratt* (b), *Best, C. J.*, says, "All insurance offices are desirous to consult with the medical man who has been last in attendance on the life insured." And in *Everett v. Desborough* (c), the same learned judge refers to the decision in the former case, and says, "No longer ago than when the case of *Morrison v. Muspratt* was decided, this Court held, that if there was a reference to a man who *had been* the usual medical attendant, and no reference to the person who *was* the medical attendant on the life insured at the time the policy was effected, such an omission to refer to the proper person would vacate the policy." Now here Duck had ceased to

(a) 6 Car. & P. 1.

(b) 4 Bing. 62; 12 Moore, 231.

(c) 5 Bing. 503; 3 M. & P. 100.

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be her medical attendant, and if she had been taken ill, Day would have been the person who would have been called in, and he had in fact prescribed for her. [Lord Abinger, C. B.—In my opinion, the argument as to who is the usual medical attendant, ought not to be carried to such extreme length. If it were, according to that doctrine, if a man were to dismiss his physician who had attended him twenty years, and take another whom he only employed a week, and then went to effect a policy on his life, he ought to give the name of the latter as his usual medical attendant.] It is, at all events, a question for the jury, and it was fairly left to them, and they have found that Mr. Day was the usual medical attendant.

Crowder and Barstow, contra.—If the Court should think that the learned judge was wrong in deciding that the plaintiff ought to begin, it would clearly be a ground for granting a new trial. And here the defendant was entitled to begin. The second plea alleges that Mrs. Huckman “had not led nor did she continue to lead a temperate life,” on which issue is taken. The onus of proving that, therefore, was upon the defendant. The Court will not presume intemperance in any one, and the defendant having asserted it, the onus lay upon him to establish the fact. [Alderson, B.—If the plaintiff is bound to aver the truth of the declaration, that she had led a temperate life, the affirmative is on him].

Secondly, the knowledge of the wife was the knowledge of the husband for this purpose. Whether or not she was aware that she had had delirium tremens, or an erysipelatous affection of the legs, she knew that she had been seriously ill as alleged in the third plea, and it was of the utmost importance to the company to have been made acquainted with that circumstance. But it is said, that on this form of plea, the question cannot arise whether the knowledge of the wife be sufficient. This is a plea founded on the

common law, and the party pleading undertakes to shew the knowledge of the plaintiff by the usual evidence applicable to such a subject matter. The life of the wife is the life insured, and she is the agent of the plaintiff, and knowledge in her is sufficient. She was sent by him to make a communication at the office of all she knew. [Lord *Abinger*, C. B.—She was not sent to effect the policy; she was merely sent for the purpose of answering the questions put to her at the office. If she had been sent to effect the policy, she would then be the agent of the husband for that purpose, and any concealment by her would have been concealment by him, and would have vitiated the policy.] If not the general agent, she is the agent of the husband for answering the questions put to her; she is his agent to make the statements required, and that would affect the plaintiff just as much as if he had made them himself. [Lord *Abinger*, C. B.—That question is not raised by these pleadings.] In *Fitzherbert v. Mather* (a), it was held, that any person acting by the orders of the assured, and who is anywise instrumental in procuring the insurance, is bound to disclose all he knows to the underwriter, before the policy is effected; and where any misrepresentation arises from his fraud or negligence, the policy is void. [*Alderson*, B.—There the plea was the general issue.] Certainly: but though since the new rules the party is to plead specially, that is done here in terms sufficient to raise the question, and it is enough to shew knowledge in the agent, as that is the same as knowledge in the principal; it is the same, as respects the pleading, whether the party has knowledge directly or constructively. *Gladstone v. King* (b), and *Sweet v. Fairlie* (c), are authorities to the same effect as *Fitzherbert v. Mather*. Beside the declarations which Mrs. Huck-

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(a) 1 T. R. 12.

(b) 1 M. & Selw. 35.

(c) 6 Car. & P. 1.

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man has made and signed, she was bound to communicate other matters which she knew affecting the insurance. [*Alderson, B.*—You have pleaded that it was to the knowledge of the plaintiff. The question is whether, under that plea, you can shew the plaintiff knew it, by proving that his wife knew it.] It is sufficient to shew that it is to the knowledge of the plaintiff or any of his agents; although the defendant intend to affect him through his agent, it is not necessary to plead that. [*Alderson, B.*—There is no doubt that the knowledge of the agent who makes a contract, and of the principal, is the same. But the question is, whether you must not plead specially, that the person who was sent to make these declarations, had knowledge which she concealed: all the cases cited occurred under the general issue before the new rules. It is one thing to state the concealment of a fact by an agent, and another to say, in the language of this plea, that it was to the knowledge of the plaintiff.]

Thirdly, as to the medical attendant. The question, “who is your usual medical attendant?” must have reference to a person who had been accustomed to attend her. It is said that Mr. Day was the person who would have been sent for to attend her if she had been taken ill; but that is not sufficient. It may be admitted that it is a question for the jury, but the mode in which it was left to them was not the correct mode. It appeared from the evidence, that Mr. Duck had attended this person for several years previously to her marriage in 1832, and that Mr. Day had never attended her more than once, and that casually. The question was not whether Mr. Day was employed in the family of Mr. Huckman, but who was the usual medical attendant of Mrs. Huckman. Under the circumstances of the case, the learned Judge ought to have told the jury, that Day could not be called her medical attendant at all.

LORD ABINGER, C. B.—We have no doubt as to the first point, that the Lord Chief Justice was right in ruling that the *onus probandi* was upon the plaintiff, and that he was entitled to begin. We cannot agree, however, that this is a matter entirely for the disposal of the Judge at *Nisi Prius*. I cannot say that we should interfere in a very doubtful case; but if the decision of the Judge were clearly and manifestly wrong, the Court would interfere to set it right. This is sometimes a very important matter, and a departure from the usual rule might be attended with serious consequences. With respect to the other points, they require some attention, and the Court will consider its judgment.

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Cur. adv. vult.

On the following day, the judgment of the Court was delivered by

LORD ABINGER, C. B.—This was an action on a policy of insurance on the life of Mrs. Elizabeth Huckman, effected by her husband. The two points on which the question appears to have turned arose on separate pleas. The third plea alleges, that the plaintiff had concealed certain facts that were material, and which he knew at the time he effected the policy; and the evidence in support of that plea went to shew the wife had been examined by the defendant, when she did not mention the facts which it was supposed she knew to be material. It was contended by Mr. Crowder, on behalf of the defendant, that the wife of the plaintiff was for that purpose the agent of the husband, and that the knowledge of the wife ought to be considered the knowledge of the husband: the jury found that the husband did not know the facts which were supposed to be material. Now, of course, if the wife had been the general agent going to effect this policy for her hus-

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band, it would be like any other agent going to effect a policy for his principal, whose knowledge might be considered the knowledge of his principal for the purpose of effecting the policy. But in this case the wife was not the agent of the husband for the purpose of effecting the policy; she was no otherwise his agent than to answer particular questions, such as the company might choose to ask of her, and she was only to answer questions which they were to put; and if they had put to her any questions of a kind calculated to elicit a particular fact said to be concealed, it might be questioned then whether or no she was not his agent for that purpose. But no such question was put; it was said she knew of certain illnesses she had had before, and concealed that fact; however, she gave general answers to printed questions; and we think the meaning of the plea therefore is, what the jury have found it to be, that the husband himself had no knowledge, and it cannot be considered to be an allegation that the plaintiff through his agent had knowledge. The effect of the plea is, that the husband had personal knowledge; the jury have found that he had no knowledge, and we think the verdict cannot be disturbed on that ground. The other point involves a question of considerable importance—who is the usual medical attendant in the employ of the party who is about to effect a policy on his or her life? Now, in that respect, the case is not at all embarrassed by the question of agency, and must be treated in the same manner as if the plaintiff himself had been the person whose life was insured. He sends his wife to answer printed questions, and she is asked a question—"Who is your usual medical attendant?" Now, let it be considered for a moment what is the grammatical sense of that question? It is in the present tense. Suppose a person goes to effect a policy on his life, who had no me-

dical attendant in the last year: if the answer to the question were, "I have no such medical attendant," must not that question of necessity be followed by another question, which is, "Who was your former medical attendant?" The terms and nature of the question prove that it was designed to extract from the person, who is the medical attendant best able to give an account of her constitution at that time; and if she has no usual medical attendant in the precise grammatical sense of the question, it appears to me that she is bound to mention who is the medical attendant who could give that information. The facts of this case appear to be, that this lady had been attended by Mr. Duck, her medical man at Bristol, for a considerable time, during several years, and down to her marriage in the month of December, 1832. Previously to her marriage she had made one or two attempts to effect a policy on her life, and Mr. Duck had been referred to as her medical attendant, and on Mr. Duck's representations, the parties with whom she proposed to effect the policy had declined to do so. She was married in December, 1832, and it was stated that from that time Mr. Duck ceased to attend her, but that a gentleman of the name of Day, who had been attending on her husband, and was the usual medical attendant of the family, upon one or two occasions, not being called in to attend her expressly, but accidentally calling on the family, had advised her to take something for a cold, and gave some sort of a prescription, but of so little note that he had no memorandum of it in his book. Now when she was called on to answer the question, "who was her usual medical attendant?" she said, Mr. Day, and Mr. Day being examined by the company's agent, said she was perfectly well for aught he knew; he had never attended her professionally at all. When he was examined at the trial, he said he had attended her once or twice; he was not sure he had attended her a

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second time, but he had once or twice given advice for her; that is all he said. Now the question is, whether she gave a proper answer. The Chief Justice left it to the jury to say whether her usual medical attendant was Mr. Duck or Mr. Day, and if that was the question for the jury, certainly the mode in which he left it cannot be complained of: but it appears to the Court that there was another question behind, which he ought to have left to them; namely, whether, from the peculiar circumstances in which Mr. Day was introduced to her notice as a medical man, he could be called her usual medical attendant at all. The word "usual" implies having attended more than once, but he never had attended her more than once or twice, and he could or would not even swear to twice; but Mr. Duck had attended her in a serious illness, and had visited her for several years; and although he, it was said, had retired from business, he was not withdrawn from the opportunity and the means of an inquiry being made of him, if she had referred to him. It appears to us, therefore, that the Chief Justice would have done right if he had laid it down to the jury, that if she, in answering that question, was aware that the person whose name she gave could not be the proper person to render the account that the defendant wished to have of her, it was her duty to have mentioned the circumstance, and to have stated that although Mr. Day was a person whom they might send to, he was not the usual attendant, but that the usual attendant had been Mr. Duck. Let us illustrate it thus:—suppose Mr. Day had never attended her at all, but that when she married, she had ceased to have any medical attendance; what answer ought she to have given? Suppose she answered, "I have no usual medical attendant," that answer would have been followed up by this question: "But had you ever any usual medical attendant?" She must have known that the question was intended to elicit from her an answer designating the person who could give the best

information of the state of her constitution at that time. It appears to me, and the Court are of that opinion, that the Chief Justice should have left it to the jury to say whether, under these circumstances, Mr. Day could properly be called her medical attendant at all; and if he could not, then, as a necessary consequence, the jury have found a wrong verdict. But that is owing in some degree to the Chief Justice not assisting them by a definition of what was the real object of that inquiry, and what was the real *bonâ fide* sense in which this question should be answered. She must have known that the answer was intended to deceive, more especially when it is considered that she was aware that on one or two former occasions, Mr. Duck's answers had prevented her effecting any policy at all. Under these circumstances, we think there ought to be a new trial, as the verdict was not satisfactory on that point.

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Rule absolute.

WAGSTAFFE v. SHARPE.

DEBT for work and labour as a surgeon and apothecary, and for medicines found and provided for the plaintiff. Plea, *nunquam indebitatus*, and issue thereon. The cause was tried in 1837, before the under-sheriff of Middlesex, when the plaintiff was nonsuited, on the ground that he had not produced his certificate as an apothecary, or proved that he was in practice on or before the 5th of August, 1815. *Thomas* obtained a rule pursuant to leave reserved, to set aside the nonsuit and enter a verdict for the plaintiff, on the ground that the plaintiff could

Since the rules of H. T. 4 Will. 4, in an action brought by an apothecary, for work and labour as an apothecary, and for medicines, the plaintiff must either prove his certificate, or that he was in practice as an apothecary before the 5th of August, 1815, pursuant to 55 Geo. 3, c. 194,

s. 21, although the defendant has only pleaded *nunquam indebitatus*.

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1838.

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not be called upon to give the above evidence upon the single plea of *nunquam indebitatus* (a).

Heaton shewed cause in Michaelmas Term last.—This is not a matter of defence which need be specially pleaded, but is rather a defect of proof on the part of the plaintiff: *Morgan v. Ruddock* (b), *Wills v. Langridge* (c), and *Spearwood v. Hay* (c). Since the passing of the stat. 55 Geo. 3, c. 194, it is incumbent on the plaintiff, to entitle himself to recover, either to prove that he was in practice before the 5th of August, 1815, or to produce his certificate as an apothecary. The 21st section enacts, "that no apothecary shall be allowed to recover any charges claimed by him in any court of law, unless such apothecary shall prove on the trial that he was in practice as an apothecary prior to or on the 5th day of August, 1815, or that he has obtained a certificate to practise as an apothecary from the Master, Wardens, and Society of Apothecaries as aforesaid." The new rules cannot interfere with the express enactments of this statute. But even by these rules, upon the plea of non assumpsit, (and the rule applies equally to debt (d)), the character in which the party sues is put

(a) The rule was granted in the alternative, for setting aside the nonsuit, or for a new trial, on the ground of misdirection by the under-sheriff, in not separating from the rest of the plaintiff's claim that part of it which was for medicines dispensed to the defendant's wife as ancillary to her accouchement, in which the plaintiff had acted as man-midwife. The under-sheriff had given leave to move to enter a verdict for 40s. on this account, if the Court should be of opinion that the plaintiff was entitled to recover it. *Allison v. Haydon* (4 Bing.

621), *Steel v. Henly* (1 C. & P. 74), and *Simpson v. Ralfe* (4 Tyr. 325), were cited; but as in this case the plaintiff was not shewn to be either a surgeon or apothecary, or to have dispensed medicines as ancillary to his employment *as such*, the Court, on hearing cause shewn, said, that there were no materials for the point set up as a ground for a new trial.

(b) 4 Dowl. P. C. 811.

(c) 5 Ad. & E. 383.

(d) See Reg. Gen. H. T. 4 Will. 4, in Covenant and Debt, 2.

in issue, and he must prove it. The rule of H. T. 4, *Reck. of Pleas*, 1838, Will. 4, Assumpsit, 1, says, "in all actions of assumpsit (except on bills of exchange and promissory notes) the plea of non assumpsit shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law." [*Alderson, B.*—You must contend that if the plaintiff's right to recover is not put in issue, as where there is a plea of accord and satisfaction, or a release, he is still bound to prove his certificate. Suppose the declaration were—"A. B., who has obtained a certificate from the Master, Wardens, and Society of Apothecaries,"—then proceeding to set forth a claim for work and labour, and the issue were upon the work and labour; is the plaintiff then to prove what is admitted, namely, that he was an apothecary?—His Lordship referred to *Potts v. Sparrow* (a)]. In *Shearwood v. Hay* (b), Lord Denman, C. J., says—"The statute requires that, before any person shall be allowed to recover charges made by him as an apothecary, he shall prove that he was duly qualified. The under-sheriff held that the qualification was a part of the plaintiff's title to recover, which the statute made it imperative on him to prove, and I think that ruling was right." In that case *Patteson, J.*, supports his opinion in *Morgan v. Ruddock*. In *Field v. Wood* (c), it was held that the fact of a cheque being post dated need not be specially pleaded. Even in an undefended cause, it must be part of the plaintiff's case to prove his qualification. [*Alderson, B.*—At the time of the passing of the stat. 55 Geo. 3, c. 194, every thing which avoided the contract might be given in evidence under the general issue. By the Statute of Frauds, a memorandum in writing, in certain cases, must be shewn before the plaintiff

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(a) 6 C. & P. 749; 1 Bing. N. C. 594; 1 Scott, 578.

(b) 5 Ad. & E. 383.

(c) 2 Nev. & Par. 117.

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can recover; he must show a valid contract. *Parke, B.*—There it is the evidence itself of the contract. But must you not read the act of parliament with some qualifying words, such as that “if the certificate is put in issue,” the plaintiff shall not recover]? It may be assumed it could not be proved, no affidavit having been produced to shew he was an apothecary. In *Potts v. Sparrow (a)*, it was held that the illegality of the contract could not be given in evidence by the defendant under the plea of non assumpsit; but here the character in which the plaintiff sues must be proved by him as part of his case. [*Alderson, B.*—*Potts v. Sparrow* shews that the illegality of the consideration must be pleaded, and turns on Reg. H. T. 4 Will. 4, Assumpsit, 3. These may have been services performed in an illegal manner, for which no contract can be implied (b)].

Thomas, in support of the rule.—The plaintiff, in an action on an apothecary’s bill, is not required in *all* cases to shape his proof according to the words of the statute. The words are, that he shall not recover, &c., “unless he shall prove *on the trial*.” What is meant by *proof on the trial*? Suppose the defendant at the trial had said, “I will not require you to prove that you are an apothecary.” Would that be proof? If so, it is equally proved when the declaration states that the party was an apothecary, and that is passed over in the plea without notice. It must be contended on the other side that absolute proof is necessary in all cases. If the character of the party suing is a part of the contract, then the rule of H. T. 4 Will. 4, Assumpsit, 3, says: “All matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground

(a) 6 C. & P. 749; 1 Bing. N. C. 594; 1 Scott, 578.

(b) As to this, see *Bartlett v. Vignor*, Carthew, 252, per *Holt, C. J.*

of fraud or otherwise, shall be specially pleaded." Every statutable illegality must be pleaded: *Barnett v. Glossop* (a). In debt, the rule is, "that all matters in confession and avoidance shall be pleaded specially, as above directed in actions of assumpsit." *Potts v. Sparrow* is clearly in the plaintiff's favour. What are these (as contended on the other side) but services illegally performed, which, in that case, was not allowed to be shown under non assumpsit? In *Moore v. Dent*, (cited in *Beck v. Mor-daunt* (b)), which was an action on an attorney's bill, it was held by *Parke, B.*, that upon non assumpsit the plaintiff need not prove the delivery of a signed bill. These cases are at variance with *Morgan v. Ruddock* (c), which cannot be supported. Suppose the defendant had demurred: that would have been a trial by the Court:—must the plaintiff's qualification have been proved in that case?

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Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—This case has been the subject of much consideration, but we have at length come to the conclusion that, as this is only a court of co-ordinate jurisdiction, we are bound by the decision in the Court of King's Bench, in *Shearwood v. Hay* and *Wills v. Langridge*, however great the doubt which some of the members of this Court may feel as to the propriety of that decision. The rule will therefore be discharged.

Rule discharged.

- (a) 1 Scott, 621; 1 Bing. N. C. 140; 4 Dowl. P. C. 112.
183; 3 Dowl. P. C. 625. (c) 2 Dowl. P. C. 411.
(b) 2 Scott, 178; 2 Bing. N. C.

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1838.

JONES v. SMITH.

A plea in abatement, of the coverture of the defendant, is not a plea of non-joinder within the meaning of the statute 3 & 4 Will. 4, c. 42, s. 8.

THE defendant, being sued as a feme sole, pleaded a plea of coverture in abatement, which did not comply with the requisites of the statute 3 & 4 Will. 4, c. 42, s. 8, which enacts, "that no plea in abatement for the nonjoinder of any person as a co-defendant shall be allowed, unless the residence of such person shall be stated with convenient certainty in an affidavit verifying such plea:" whereupon the plaintiff signed judgment. *Addison*, on a former day, had obtained a rule to shew cause why this judgment should not be set aside for irregularity, against which

James shewed cause.—The plaintiff had a perfect right to sign judgment. The question is, whether this is a "plea of nonjoinder" within the meaning of the statute. The plea in effect amounts to a plea of nonjoinder, because the action cannot be maintained without a joinder of the husband.

Addison, contra.—The object of the statute was intended to apply to the case of joint contractors, in order that the plaintiff might reply, if the fact were so, that they were discharged from responsibility by bankruptcy or insolvency. No replication in avoidance of this plea could be framed so as to make the present action maintainable, for all the authorities shew that, under the circumstances stated in the plea, the action is improperly brought against the wife alone.—He referred to *Barden v. Keeverberg* (a), and the cases there cited.

PARKE, B.—If the 8th section of this statute be taken in connexion with the 9th and 10th, it manifestly appears that this case was not within the contemplation of the framers of that section, and that it applies only to the case of co-con-

(a) 2 M. & W. 64.

tractors. By the 9th section it is enacted, that the plaintiff may, in answer to a plea like the present, reply that the other person named in the plea has been discharged by bankruptcy or insolvency. This clearly shews that the clause was meant to apply only to the case of a co-contractor, or of some person jointly liable with the defendant, so that in the event of the bankruptcy or insolvency of that person, the plaintiff might reply that fact, and continue his action against the solvent defendant alone. Now, this cannot possibly apply to the case of a married woman, for the plaintiff could not, by replying the bankruptcy or insolvency of the husband, entitle himself to continue the action against the wife. Even the temporary absence of the husband from the kingdom, out of the jurisdiction, would not render the wife liable to be sued alone, so long as the coverture lasted. This clearly appears from the cases of *Kay v. The Duchess of Piennes (a)*, and *Farrer v. Granard (b)*. Nothing short of proving that the husband was *civilitur mortuus* could entitle a party to do so. We think, therefore, that the rule must be made absolute; but, as it is a point about which some question might fairly be raised, it must be without costs.

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1838.

JONES
v.
SMITH.

Rule absolute, without costs.

(a) 3 Camp. 123.

(b) 1 N. R. 80.

REES v. WALTERS.

TRESPASS.—The first count stated that the defendant, on the 3rd of October, 1836, seized and took three

Where the
question in an
action of tres-
pass was, whe-

ther the plaintiff or one T. W., under whom the defendant claimed, was entitled to the close upon which the supposed trespass was committed:—*Held*, that T. W. was a competent witness for the defendant, inasmuch as the result of the suit could not change the possession.

Semble, that he would not have been a competent witness if the action had been ejectment.

T. W. occupied land under one W., who was lessee for lives, and paid the rent reserved by the lease. The day after the lease expired, T. W. went and obtained the lease from W. and J., who claimed no interest in it, and delivered it up to the lessor, from whom he took a fresh demise of the land. The lease was produced from the custody of the lessor at the trial:—*Held*, that it came from the proper custody.

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1838.

Ross
v.
Walters.

cows of the plaintiff, and drove them away and impounded them. The second count was for breaking and entering a close of the plaintiff's called Cae Cwm. To the first count the defendant pleaded, that he was lawfully possessed of a certain close, and because the said cows were wrongfully in the close, depasturing the grass, &c., therefore he took them as a distress damage feasant. Replication to the first plea, that the defendant was not possessed of the close in that plea mentioned. The cause was tried before *Coltman, J.*, at the last assizes for the county of Carmarthen, when the question was, whether the plaintiff or one Thomas Walters, under whom the defendant claimed, was entitled to the possession of the close mentioned in the pleadings. On the part of the plaintiff, it was proved that he had been in possession of the close in question for thirty or forty years, and that the defendant, in the year 1836, had entered, and driven the plaintiff's cattle to the pound. The defence was, that the close was part of a farm which, in 1772, had been leased for three lives to one Edward Walters: that for some years before 1836, (when the lease expired), Thomas Walters had occupied the farm under one Williams, paying to him the rent reserved by the lease; that on the expiration of the lease in 1836, the locus in quo, together with the rest of the farm, was relet by Williams to Thomas Walters. Thomas Walters having been called to prove these facts, was objected to as incompetent, but the objection was overruled, and he was examined. The lease of 1772 was produced, and it was stated that T. Walters obtained it on the day after the last life dropped, from two persons named Williams and Jones, and carried it to Williams, his landlord, to whom he delivered it up, and took a fresh demise of the farm from him. It was objected that the lease of 1772 was not shewn to come from any proper custody, but the objection was overruled, and the defendant obtained a verdict.

Evans now moved for a new trial, on the grounds of objection urged at the trial.—First, the evidence of Thomas Walters to prove the underletting of the farm to the defendant was improperly received, as he was interested in the event of the suit. He came for the purpose of making out his own title; if the possession of the defendant was shewn to be lawful, he would be entitled to the rent. It has been held that a landlord is a competent witness on the trial of an action between A. and B., where they both claim to hold of him, as the possession of either of them would be his possession; but where they claim in different rights, he is not competent, *Fox v. Swann* (a), *Bell v. Harwood* (b). [Lord Abinger, C. B.—The verdict cannot be evidence either for or against him]. He has an immediate interest in the rent, which depends upon whether the possession of the defendant were lawful or not. [Parke, B.—The immediate result is nothing more than the damages which the plaintiff has sustained. If you could make out that the verdict would be evidence, it would come within the recent statute. Having examined him as a witness, it is under the recent statute equivalent to a release, and the interest is removed]. His name has not been indorsed on the record. [Alderson, B.—It cannot be indorsed now, but that makes no difference. You may prove by parol evidence that he was examined as a witness at the trial, and then the verdict could not be used as evidence for or against him. You must shew that he has some interest beyond the use which could be made of the verdict]. It is submitted that he has a direct interest in the event of the suit. In *Doe d. Lord Teynham v. Tyler* (c), it was held that a remainder man after a tenant in tail is not a competent witness for the tenant in tail, in an action of ejectment brought to recover the entailed

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1838.

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v.
WALTERS.

(a) *Style*, 482.

(b) 3 T. R. 308.

(c) 6 Bing. 390; 4 M. & P.
29.

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1838.

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WALTERS.

property. [*Parke, B.*—There the party has a direct interest, because the result of the verdict is to put him in possession; the seisin of the tenant in tail is the seisin of the remainder man, the estate in possession and the estate in remainder being, for this purpose, but one estate; therefore he advances his own interest].—What is said by *Tindal, C. J.*, in delivering the judgment of the Court, applies to the present case. “The tenant in possession in ejectment could not be called to prove the title of the defendant, under whom he claims to hold; nor could the landlord be called to prove the title of the tenant who defended the possession.” [*Parke, B.*—There the necessary result of the verdict would be to turn the landlord out of possession. *Lord Abinger, C. B.*—In this case the verdict would not change the possession. *Parke, B.*—The short answer to the objection is, that any result of this action, whether it be the recovering of damages by the plaintiff, or a verdict for the defendant, or a nonsuit, would in no way affect the landlord. The objection goes to his credit, not his competency. *Alderson, B.*—If the contest in the cause was as to the possession of the land, the argument might be a good one, but the landlord is not interested in any question of damages between these parties]. Then as to the other objection; the lease was not shewn to have been brought from the proper custody. It should have been shewn to have come out of the custody of either the tenant or the landlord; but though *Thomas Walters* was the tenant under that lease, he did not obtain possession of it until after the term had expired. The persons from whom he got it were strangers to all parties, and it was not shewn how it came into their possession. [*Parke, B.*—It is in the hands of the lessee immediately after the determination of the term. Suppose the tenant had obtained possession of the lease during his tenancy, and had produced it on the trial, would not that have been sufficient]? Yes;

that would have been the proper custody; but here he never had it during the term. It being shewn to have come from the custody of Williams and Jones, after the expiration of the term, it is insufficient both as respects the persons, and the time when they held it, Thomas Walters not being a party to it, nor connected with it as assignee or otherwise.

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1833.

BRIDGES
v.
WALTERS.

LORD ABINGER, C. B.—It appears upon the facts of this case, that Thomas Walters had been in possession of the land demised for many years, and had, during that time, paid the precise rent reserved by the indenture of lease. Immediately after the expiration of the lease, he went to Williams and Jones, and got the lease from them. They claimed no interest in it, but admitted his right to it, and he gave it up to the landlord, who renewed the lease. It is admitted, that if the tenant himself had had possession of the lease during his term, and produced it at the trial, that would have been the proper custody. It appears to me to be sufficient evidence to go to the jury that Williams and Jones, from whom he obtained it, admitted his right to the possession of it, and, by inference, acknowledged that they held it on his account.

PARKE, B.—I think there was evidence that this lease was produced from the proper custody. The rent paid by Thomas Walters, and that reserved by the lease, were the same. That is a circumstance to connect him with the lease. He had possession of the lease, though not during the term: he obtained it from Williams and Jones, who, by the act of giving it up to him, admitted his right to the possession of it, and must be presumed to have held it on his account. Then his giving it up to the landlord was a continuance of the same possession, which was the proper possession of the instrument. I rather think it is for the Judge to say whether a document is produced

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from the proper custody or not, and we cannot interfere unless we think him wrong. The learned Judge, in this case, was satisfied with the evidence, and I see no reason for dissenting from him.

ALDERSON, B.—I am of the same opinion. There should be not merely evidence, but satisfactory evidence, of the instrument being produced from the proper custody. I think there was such satisfactory evidence in this case.

Rule refused.

PINNOCK and Another, Assignees of CHARLES BEAN, a
Bankrupt, v. HARRISON.

In trover for certain iron-work, the defendant set up as a defence a lien on the iron-work, for work done to it at the plaintiff's request:—*Held*, that a claim of set-off to a larger amount on the part of the plaintiff, was no answer to the lien, unless it had been agreed between the parties that the one should be deducted from the other.

TROVER for certain carriages, axle-trees, springs, and 10 cwt. of iron. Pleas, first, not guilty: secondly, that before and at the time when, &c., in the said declaration mentioned, the defendant was a coach body maker, and the trade and business of a coach body maker used, exercised and carried on; and that before the said Charles Bean became a bankrupt, to wit, on the day and year in the declaration mentioned, the said goods and chattels in the declaration mentioned, then being the proper goods and chattels of the said Charles Bean, were delivered by the said Charles Bean to the defendant, for the purpose of being wrought and repaired by the defendant, in the way of his said trade, for the said Charles Bean, and at his request, for reasonable reward to the defendant in that behalf: that he the defendant, then and before the said Charles Bean became a bankrupt, and before the said time when, &c., in the declaration mentioned, received the said goods and chattels in the declaration mentioned from the said Charles Bean, under and by virtue of the said delivery, and for the purpose and on the terms aforesaid: and that he the defendant, on divers days and times after the said delivery and receipt of the said goods and chat-

tels, and before the said Charles Bean became bankrupt, did bestow his work and labour, and did work and repair the said goods and chattels in the declaration mentioned, in pursuance of the said purpose of the said delivery, as aforesaid, and that he therefore reasonably deserved to have for such reasonable reward as aforesaid, for and in respect of the said work and labour, a large sum of money, to wit, the sum of 8*l.*, of which the said Charles Bean then had notice, and then became indebted to him the defendant in the said last mentioned sum of money, by reason of the premises aforesaid, and the said last mentioned goods and chattels had from thence hitherto remained and continued in the custody of the defendant. Wherefore, and because the said last mentioned sum of 8*l.* at the said time when, &c., in the declaration mentioned, was, and continued wholly unpaid and unsatisfied, and was not at any time tendered to the defendant, he the defendant did detain and still detains the said last mentioned goods and chattels, as a security and lien for the said last mentioned sum of 8*l.* so due and owing to the defendant, as aforesaid; which was the alleged conversion and disposal thereof to the use of the defendant in the declaration mentioned.

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&
HARRISON.

Replication to the second plea, *de injuriâ*.

At the trial before Lord *Abinger*, C.B., at the Middlesex Sittings after Hilary Term, it appeared that the action was brought to recover the value of certain carriage iron-work which had been sent by Bean, the bankrupt, to the defendant, about the month of December, 1835, to have wood work attached to it as part of a carriage. It consisted of patent axletrees, four springs, and all the iron-work of a carriage. Not being sent home at the expiration of several months, though a fortnight would have sufficed to do what was required, Bean sent several times to the defendant to send it home done or undone, and the defendant said it should be sent home in a few days.

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In the month of August, 1836, the carriage not being then finished, the defendant bought of Bean a second-hand tilbury at the price of 18*l.* 18*s.*, and paid 7*l.* on account. It appeared that there was a balance due from Bean to the defendant of 2*l.* 11*s.* 6*d.* upon former dealings between them, which, together with the 7*l.* paid, reduced the sum due for the tilbury to 9*l.* 6*s.* 6*d.* At the time the defendant paid the 7*l.*, he promised to send home the carriage finished or unfinished, and to send in the account on the Monday following; the conversation having taken place on a Saturday. This, however, he did not do, and on a subsequent application by Bean, on the Tuesday following, when he made a demand of the carriage, the defendant said that he had made a sale of the tilbury by taking 7*l.* on account; that he should charge what he thought right for the work done to the carriage, and he would take his own time over it. The work was afterwards finished, and it was proved to be of the value of 8*l.* only. It was contended on behalf of the plaintiff, that under these circumstances, and upon the state of the account between the parties, no lien could arise; and secondly, that even if it could, it had been waived by the defendant's promise to return the carriage. The Lord Chief Baron having overruled both the points raised, the jury, under his direction, found a verdict for the defendant, but he gave the plaintiffs leave to move to enter a verdict for them, if the Court should think that either of the objections ought to prevail.

Crowder now moved accordingly.—As it appeared that there were accounts between the parties, the lien did not attach. A tradesman who does work on a particular chattel has a lien on it, as a security for the price of the work done; but no lien exists when the contract shews that the tradesman had no intention of looking to the chattel as a security, but trusted the party himself. The agreement

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to send home the iron-work on the Monday, done or undone, and to settle the accounts, was in fact a special contract between the parties, inconsistent with a lien; for payment for the work was to go in account against the purchase money agreed upon for the tilbury. *Chase v. Westmore (a)*. [Parke, B.—Was there an agreement between them that one should be deducted from the other? Suppose it had turned out that the expense of the work done had amounted to 20*l*.] The whole doctrine of lien depends upon this, that the tradesman shall not be deprived of his security for the work done to the chattel; but when he has already sufficient money in his hands, the right of lien does not attach. [Alderson, B.—Here is a tradesman who has a debt owing him for which he has a security, and there is on the other hand a debt for which the other has no such advantage: without an agreement that one debt shall be deducted from the other, can you have a right to do so? Suppose you have a right to bring trover and recover, what is there to prevent the plaintiff from bringing another action for the amount of the debt? The defendant is to lose his lien for nothing. Parke, B.—The only way to succeed on this replication is to shew that the debt has been paid or satisfied; then you must either prove payment or an agreement to dispense with it. It cannot be payment, if an action can be maintained to recover the debt. Besides, no right of lien attaches until the work on the goods is completed]. Suppose work is sent to a tradesman to be done, and after that an arrangement is come to that the tradesman is not to be paid for it until after the expiration of six months. [Parke, B.—Then there would be no lien; but you must prove that agreement]. Here there is an agreement in substance that the defendant shall no longer have his lien, but that it shall go into the account, which is inconsistent with the lien. Then the question is, whether there was a consideration

(a) 5 M. & Selw. 180.

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for that agreement, and it is submitted that there was; the amount of consideration is not material. [Lord Abinger, C. B.—What benefit would this be to the defendant]? It was an advantage to him not to be obliged to go on and finish the carriage. It was an advantage to Bean to have the work finished, and if he gives up his right to have it finished, it is a prejudice to him, which is a sufficient consideration. The law does not look to the quantum of it; if there be either any advantage to the plaintiff, or any detriment to the defendant, it is sufficient. If this be a valid contract, the lien is at an end, as the contract is inconsistent with it. It was not necessary that the defendant should have a lien, because he was already overpaid by the debt due to the plaintiff. If it be not so, a general lien would not be so advantageous as a particular lien, but the former has always been supposed to be more advantageous. In this case the right, if any ever existed, was waived by the act and agreement of the defendant. [Parke, B.—I doubt whether there is any contract at all].

Lord ABINGER, C. B.—I am of opinion that this rule ought to be refused. The inclination of my opinion at the trial was, that the plaintiffs ought to have made their proposed answer to the plea of lien the subject of a special replication, and shewn an agreement between the parties that one account should be set off against the other: and if they had done so, the action might have proceeded on that ground. I see no reason to change the opinion I had formed. A set-off cannot be considered as destroying a lien, unless it be so agreed upon between the parties; and as to the rest, my opinion is, that there was no binding agreement entered into to send the goods home at a particular time; there was a proposal and nothing else; a promise to do so without consideration, but no binding agreement; and it appeared to me

that that proceeded on the understanding that the defendant was to go on and finish the work.

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1836.

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PARKER, B.—I am of opinion that in this case there should be no rule for a new trial. The plea of lien shews that a debt, for which it was claimed, was unsatisfied at the time, and it was open to the plaintiffs to have shewn it was satisfied. Mr. Crowder proposes to shew that it either never existed at all, or was satisfied, because at the time the work was going on to its completion, there was a counter claim which the defendant had on the plaintiff, out of which he might have satisfied the demand, and therefore he says there never was any debt at all: and when his right to his demand was complete, he might have satisfied himself out of the set-off, and that also shews the lien, if it had existed, was at an end. I am clearly of opinion that a claim of set-off is no answer to a lien, unless it is agreed that one should be set off against the other, and in that case it is equivalent to payment. If therefore the parties had agreed that the defendant was to satisfy any account or demand he had against the plaintiff, for the work which the plaintiff knew he was carrying on for him, out of the debt which he owed the plaintiff, this would be an answer to the plea, because it would shew that he was to be paid in this way. It seems to me, however, that there never was any binding agreement between the parties, by which it was agreed between them that the amount due from the defendant was to be satisfied out of any work that was to be done, and therefore it seems to me that that ground fails.

There is another ground also, on which Mr. Crowder seeks to recover; which is, that there was a binding and conclusive agreement made between these parties, by which the defendant stipulated to return the carriage on the Monday following, and that he waived his right to go on and finish the work, in consideration of the plaintiff waiving his right to call upon him to complete the carriage.

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Harbison.

But I do not perceive that there was any binding agreement to that effect: they talk, indeed, of setting off their claims, but nothing was formally agreed on. On these grounds, it seems to me that the rule for a new trial should be refused.

BOLLAND, B.—I am of the same opinion, and I do not know that I can put it in better words than those which are reported as the opinion of the Lord Chancellor, in the case of *Cowell v. Simpson* (a), and the observations of my Lord *Ellenborough* upon it, as reported in *Chase v. Westmore* (b), where he says:—"The Lord Chancellor considers a lien as a right accompanying an implied contract; and in one passage of his judgment, he is reported to have said, 'If the possession commences under an implied contract, and afterwards a special contract is made for payment, in the nature of the thing, the one contract destroys the other;' but it is evident, from other parts of the report, that the Lord Chancellor was there speaking of a special contract for a particular mode of payment. Such a contract is apparently inconsistent with a right to detain the possession; and consequently, will defeat a claim to the exercise of such a right." It is for us then to inquire whether or no any thing passed on the Saturday, which could have the effect of destroying the lien. It appears to me, from the evidence on my Lord's note, that there was no engagement entered into that put an end to the contract of lien. I think the rule must be refused.

ALDERSON, B.—I am of the same opinion. I think the mere right of set-off cannot be considered as an answer to a claim of lien, unless the parties have so agreed. It may be, as my brother *Parke* put it, that an arrangement

(a) 16 Vesey, 275.

(b) 5 M. & Selw. 186.

might be entered into between the parties that the work to be done, on account of which the lien was to be claimed, should be paid for in a particular manner and out of a particular fund; and that being the only debt on which the lien was claimed, it might be an answer to it in that way; or, if the debt having been created, the parties come to a new arrangement, and agree that the debt shall be satisfied in a particular way, then the lien is lost; for then it would be in truth a debt paid. Unless you arrive at one or other of these conclusions, it seems to me that a mere right of set-off cannot be any answer to a claim of this description. Here there are two parties having mutual claims on each other, with this difference, that the defendant claims the advantage of a security for it, which the plaintiffs have not; unless there is a specific agreement to that effect, it would be unreasonable that the defendant should lose the benefit of his lien.

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PENNOCY
v.
HARRISON

Rule refused.

DARE v. DERHAM.

THIS was an action of debt under the statute of 3 Ed. 6, for not setting out the tithes of certain vetches or tares severed in a green state, to recover the treble value thereof. The defendant pleaded, that the plaintiff was not at the time of cutting or severing the said vetches or tares, proprietor of or entitled to the tithe of vetches or tares so severed, on which issue was joined. The following case was stated for the opinion of the Court:—

Seemle, that a lessee of tithes of "sheaf corn and grain," is not (unless a usage be shewn) entitled to the tithe of vetches severed in their green state.

The plaintiff is lessee of all manner of tenths and tithes of sheaf corn and grain, yearly coming, growing, or renewing within the parsonage and parish of North Curry, in the county of Somerset, containing 1840 statute acres of arable land.

The defendant is the occupier of certain lands in the

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parish of North Curry, upon fifteen acres of which vetches were grown, and which the defendant, in the month of June 1836, severed in a green state. Of these vetches, the produce of about one acre and amounting in value to about 50s., were sent to market by the defendant and sold, the tithe on which would amount to 5s. and the treble value 15s. With the remainder of the vetches the defendant fed his horses and cattle on his farm, and the plaintiff did not on that account demand any tithe for the vetches so fed. It is admitted that the plaintiff has no claim to small tithes within the parish.

The question for the opinion of the Court is, whether the plaintiff, being the owner of the great tithes in the parish of North Curry, in the county of Somerset, is entitled to the tithe of vetches or tares severed in their green state.

If the Court shall be of opinion in the affirmative thereof, then the defendant agrees that judgment shall be entered against him by confession for 15s. damages immediately after the decision of this case, or otherwise as the Court shall think fit, and that judgment shall be entered accordingly. But if the Court shall be of a contrary opinion, then the plaintiff agrees that a judgment shall or may be entered against him of nolle prosequi immediately after the decision of this case, or otherwise as the Court may think fit.

Kelly, for the plaintiff.—This point appears not to have been disputed for a long series of years; the authorities seem uniform in favour of the plaintiff. Plowden, in his *Treatise on Tithes*, lays it down that “tares, whether cut green or ripe, are a great tithe, and belong to the rector; but if given to cattle of husbandry, not subject to tithe, as the Court seemed to think:” and he refers to *Hayse v. Dowse* (a), the inference from which seems to be that

(a) Bunb. 279.

if not given to cattle they are titheable. But the exemption, even in the case put, is disputed in Watson's Clergyman's Law, c. 49, p. 539, where it is said, "it seems, without custom, that green tares cut to feed labouring cattle shall be prized tithes." In Burn's Ecclesiastical Law, Tithes, 422, tares and vetches are classed with "corn and other grain." The tenant, by cutting the vetches in a green state, cannot deprive the tithe-owner of that to which he would be entitled on its arriving at maturity.—He cited *Dawes v. Benn (a)*.

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PER CURIAM.—The Court gave no opinion upon this point in that case. That was a question between rector and vicar. The person entitled to rectorial tithes is entitled to all unless there is a vicar, and then the rector has all which the vicar has not; the excepted tithes depend upon enjoyment and usage. This case states nothing as to usage. Then, how can the plaintiff bring himself within the words of the grant to him? He claims as "lessee of sheaf corn, and grain." This cannot be said to be either corn, grain, or sheaf. The case states that the plaintiff is not entitled to the small tithes; then somebody else must be entitled to them.

Kelly then prayed leave to amend, in order to shew the usage, if he could; otherwise to suffer judgment of non pros. No amendment being afterwards made,

Judgment accordingly.

Boteler appeared to argue for the defendant.

(a) 1 B. & Cr. 751.

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1838.

VAUGHAN v. HARRIS.

Proceedings against the sheriff, in an action against the acceptor of a bill of exchange, will be stayed on payment of the debt and costs in that action only, notwithstanding there is an action pending against the drawer also.

R. V. RICHARDS moved to rescind an order which had been made by *Gurney*, B., for a stay of proceedings against the sheriff, on payment by him of the debt and costs in an action against the acceptor of a bill of exchange. It appeared that an action was also pending against the drawer upon the same bill. *Richards* contended that the sheriff ought also to pay the costs of the action against the drawer. He referred to *Rex v. Sheriffs of London (a)*, as shewing that the practice in the office of the sheriffs of London before that case was, that when an attachment has been obtained in an action upon a bill of exchange, the costs of any actions commenced against the drawers and indorsers were always paid under the attachment; and upon application to stay proceedings in an action against the acceptor of a bill of exchange, the defendant was obliged to pay the costs in actions against the drawer and indorsers. [*Alderson*, B.—That practice is there stated to be against principle. Why should we extend it?] It appeared also that the sheriff had been guilty of some irregularity.

PARKE, B.—Whatever misconduct the sheriff has been guilty of, he is only liable to pay the plaintiff the damages which he has sustained. The case of *Rex v. Sheriffs of London* is an authority that all the sheriff is liable to pay is the amount which the defendant would be bound to pay in the action against him, and not that which he might be called upon to pay if he were applying to the Court for an indulgence.

The rest of the Court concurred.

Rule refused.

(a) 2 B. & Ald. 192.

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1838.

ROBERTS *v.* ROWLANDS.

R. *v.* RICHARDS on a former day had obtained a rule calling upon the plaintiff to state, in writing, whether the action, (which was for money had and received), was brought to recover the deposit paid him to the defendant, (an auctioneer), upon the sale of an estate, and, if so, why the plaintiff should not deliver particulars stating his objections to the title.

Jervis shewed cause.

Richards was heard in support of the rule.

PARKE, B.—The case of *Collett v. Thompson* (a) is an authority, that in actions to recover back the deposit on the ground of objections to the title, the Court will oblige the plaintiff to give a particular of all objections to the abstract arising upon *matters of fact*; and it is only reasonable that it should be so. My impression was that it was a matter of course. Objections in point of law must find out themselves. The defendant is only entitled to the particulars of objections arising upon matters of fact.

In an action for money had and received, brought to recover back the deposit paid to the auctioneer upon the sale of an estate, on the ground of objections to the title, the defendant is entitled to particulars of the objections arising upon *matters of fact*, but not of objections in point of law.

Rule absolute, the costs to be costs in the cause.

(a) 3 Bos. & Pull. 246.

GOULD *v.* DRAKE.

TRESPASS.—The declaration stated that the defendant assaulted the plaintiff, and gave him a great many

entitled to full costs, although he only recovers a farthing damages, unless the Judge certifies under the statute of Elizabeth to deprive him of costs; and a certificate under 22 & 23 Car. 2, c. 9, is not necessary.

In an action for false imprisonment, the plaintiff will be

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blows and strokes, and forced and compelled him to go along divers public streets to a station-house, and imprisoned him there. Plea, not guilty; under which the defendant sought to justify as a constable, under 21 Jac. 1, c. 12, s. 1. At the trial before *Patteson, J.*, the plaintiff recovered a verdict, with one farthing damages, and the learned judge refused to certify either under the 43 Eliz. c. 6, or under the 22 & 23 Car. 2, c. 9. The master having taxed the plaintiff his full costs,

Dundas now applied for a rule to shew cause why the Master should not review his taxation, and allow the plaintiff no more costs than damages. The statute 22 & 23 Car. 2, c. 9, s. 136, operates to deprive the plaintiff of costs unless the Judge certifies, in order to give full costs, that an assault and battery was sufficiently proved. It was formerly held that where the action was for false imprisonment, and the plaintiff recovered a verdict, he was entitled to full costs; but that proceeded on the assumption that every false imprisonment necessarily included a battery. But this Court lately held, in the case of *Rawlings v. Till*(a), that imprisonment may take place without touching the person at all. And *Bannister v. Fisher* (b), and *Emmett v. Lyne* (c), are authorities in support of that position. The reason, therefore, for the earlier decisions falls to the ground. And though a battery *may be* included in an imprisonment, the Court will not presume that a battery has taken place, unless the Judge certifies to that effect under the statute 22 & 23 Car. 2, c. 9.—He also cited *Carter v. Fish* (d), and *Wiffin v. Kincard* (e).

PARKE, B.—The authorities are very strong, that the statute 22 & 23 Car. 2, c. 9, s. 136, does not apply to actions

(a) Ante, p. 28.

(b) 1 Taunt. 357.

(c) 1 N. R. 255.

(d) 1 Stra. 645.

(e) 2 N. R. 471.

for false imprisonment, and that in such cases a farthing damages will carry full costs, unless the Judge certifies under the statute of Elizabeth. In Tidd's Practice (a), it is laid down as "now settled that the statute 22 & 23 Car. 2, is confined to actions of assault and battery, and actions for local trespasses, wherein it is possible for the Judge to certify that the freehold or title of the land was chiefly in question. Therefore it does not extend to actions of assumpsit, *false imprisonment*, or the like." This has been the constant uniform practice, which has been acted on for so many years that it cannot now be shaken.

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The rest of the Court concurred.

Rule refused.

(a) Page 963, 9th ed.

LEIGHTON v. WALES.

ASSUMPSIT.—The declaration stated, that on the 16th of November, 1837, by certain articles of agreement in writing then made and entered into by and between the plaintiff on the one part, and the defendant on the other part, after reciting that the said parties thereto were desirous of being partners, and as such, of using and coach daily, at certain hours, between London and Croydon. The agreement contained various stipulations as to the conduct of the business, and a provision that it should be lawful for either party to determine the partnership by giving four weeks' notice in writing. It contained also the following articles: 12th, that in the event of such dissolution of partnership, and so long as the plaintiff should continue to carry on the trade of a coach proprietor at Croydon, the defendant should not, either on his own account or that of any other person or persons, or jointly with any other, run or use for hire any stage-coach, omnibus, or other carriage, or otherwise ply for hire on any part of the road over which the coach was appointed to run, at any time within one hour before or after certain specified hours of the day, under the penalty of 40*l.*, to be recovered by the plaintiff as liquidated damages: and the last article also provided, that, without prejudice to the right of the parties under the preceding article, they bound themselves for the true and faithful performance of the agreement in every respect, under the penalty of 100*l.*, to be recovered as aforesaid:—*Held*, first, that the agreement of the plaintiff to enter into the partnership was of itself a sufficient consideration for the partial restraint of trade imposed on the defendant by the 12th article, and therefore that an action was maintainable for a breach of it, in running an omnibus on the road within the prohibited hours, after dissolution of the partnership by notice from the plaintiff; 2ndly, that the 40*l.* must be construed as liquidated damages, and not as a penalty.

By a written agreement, the plaintiff and defendant agreed to become partners in the business of stage-coach proprietors, for the purpose of running a

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running for hire one or more stage coaches or omnibuses, from Croydon to London and back; it was witnessed, among other things, that each of the said parties thereto did thereby promise and agree to and with the other of them, his executors and administrators, as follows:—namely, first, that the said parties thereto should on and from the 20th day of November then instant, become and be partners in the trade or business of a stage-coach proprietor, and should carry on such business under the firm of “Thomas Leighton and Thomas Wales;” thirdly, that for the present the trade or business of the said partnership should be confined to the running of one omnibus or coach daily from the town of Croydon direct over London-bridge, through Gracechurch-street, and thence through St. Paul’s Church-yard to Charing-cross, and back by the same road on the same day; and by the fifth article of the said agreement, each of the said parties thereto did promise and agree to and with the other of them, that the said omnibus or coach should leave the town of Croydon at half-past nine o’clock in the morning, and should leave Charing-cross at a quarter past four o’clock in the afternoon of every day, and that no alteration should be made in the time or other appointments of the said omnibus or coach, without the consent in writing of both the said parties thereto, to be indorsed upon or subscribed or annexed to the said agreement; and it was further, eleventhly, by the said agreement agreed by and between each of the said parties thereto, and they did thereby promise and agree to and with each other, that it should be lawful for either of the said parties to determine and put an end to the said partnership thereby created, upon giving to the other four weeks’ notice in writing of his desire or intention so to do; and twelfthly, that in the event of such dissolution, and while or so long as the plaintiff should continue to carry on the trade of a stage-coach proprietor at Croydon aforesaid, the defendant

should not, either on his own account or that of any other person or persons, run or use for hire any stage-coach, omnibus, or other carriage, nor otherwise ply for hire on any part of the said road over which the said coach was therein-before appointed to run, within one hour before or after the time thereinbefore or thereafter to be appointed, in pursuance of the fifth article of the said agreement, *under the penalty of 40l.*, to be recovered by the said Thomas Leighton, his executors or administrators, *as and by way of liquidated damages*, in an action at law. The declaration then averred mutual promises, and alleged that, in pursuance of the agreement, the plaintiff and defendant did afterwards, to wit, on the 20th of November, 1837, become partners in the said trade or business of a stage-coach proprietor, and carry on such business under the firm of Thomas Leighton and Thomas Wales, and did from thence, until the dissolution of the said partnership thereafter mentioned, run the said omnibus or coach so to be run by them under the said articles as aforesaid; and the plaintiff did afterwards, to wit, on the 22nd day of January, 1838, determine and put an end to the said partnership, upon and by then giving to the defendant four weeks' notice in writing of his desire and intention so to do; and that four weeks after giving such notice expired, to wit, on the 19th day of February, 1838, and at which period the said partnership terminated: And the plaintiff avers, that from the time of making the said agreement hitherto, he hath continued to carry on the trade of a coach proprietor at Croydon aforesaid; yet the defendant, disregarding the said agreement and his said promise, afterwards, to wit, on the 20th day of February, 1838, and on divers other days and times afterwards, and after the said dissolution and determination of the said partnership, and before the commencement of this suit, did, on his own account, and also on the account of one John Moore, and also jointly with the said John Moore, run and use for hire

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a certain omnibus, and ply for hire for the conveyance of passengers in and by a coach and omnibus, on and over the said road on and over which the omnibus or coach so to be run by the said partnership as aforesaid, was by the said agreement appointed to run as aforesaid, at divers times within one hour before, and also at divers times within one hour after the said time appointed for the said omnibus or coach so to be run by the said partnership as aforesaid, in pursuance of the said fifth article of the said agreement, that is to say, at times on those days within one hour before and one hour after half-past nine o'clock of those days, and at times on those days within one hour after a quarter past four o'clock in the afternoon of those days; and thereby the plaintiff became greatly injured and damnified: and the plaintiff avers that the defendant has not yet paid the sum of 40*l.*, nor any part thereof, &c.

Pleas, first, non assumpsit; secondly, a traverse of the breach in the terms of the declaration; on which issues were joined.

At the trial before *Gurney, B.*, at the London sittings in this term, the plaintiff put in and proved the agreement, which contained the stipulations set forth in the declaration, together with others relating to the distribution of the profits and expenses of the partnership, the finding of horses and coaches, the hiring and discharging of servants, and the keeping and settling of the accounts; and also the following article:—13. "That without prejudice to the right of either party under the last preceding article, the said parties hereto hereby bind themselves for the true and faithful performance of this agreement in every respect, under the *penalty* of 100*l.*, to be recovered as aforesaid." It was proved that the defendant had run an omnibus on the road for ten days after the determination of the partnership, within the prohibited hours, and the learned Judge thereupon directed the jury to find a verdict for

the plaintiff for 40*l.*, and desired them also to assess the amount of damage actually sustained by the plaintiff by reason of this breach of the contract. The jury assessed this damage at 5*l.*; and the learned Judge thereupon gave the defendant leave to move to reduce the damages to that amount. On a subsequent day in the term,

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Montagu Chambers moved to arrest the judgment, or to reduce the damages pursuant to the leave reserved, or for a new trial. First, the agreement on which the plaintiff sues being in partial restraint of trade, without any fair or reasonable consideration, is void. All the articles except the 12th, on which the breach is alleged, do contain a consideration moving from each party; but that article is wholly unilateral, and shews no consideration for the restraint it imposes upon the defendant, not to carry on his trade for his own profit after the determination of the partnership. Nothing can be collected which is at all in the nature of a consideration unless it be the partnership itself, and that might be determined within a month by a notice given the very next day after it was formed. It must be conceded, that since the decision in *Hitchcock v. Coker* (a), the Court will not inquire into the *adequacy* of the consideration; but that case did not overrule the previous authorities, in which the term "adequate consideration" had been employed, but only explained the sense in which it was to be understood, viz., as importing such a restraint as afforded a fair and reasonable protection to the party in whose favour the restraint was imposed. Such an agreement, therefore, is still void, unless founded upon a just and reasonable consideration, and there must be a mutuality of benefit: *Mitchell v. Reynolds* (b), *Davis v. Penton* (c), *Young v. Timmins* (d). [Lord Abinger, C. B.—

(a) 1 Nev. & P. 796.

(b) 1 P. Wms. 181, 10 Mod. 130.

(c) 6 B. & C. 216, 9 D. & R. 369.

(d) 1 Cr. & J. 331.

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The result of the cases seems to be, that the only question the Courts now inquire into is, whether the consideration is valid in law, and not colourable.]

Secondly, the damages ought to be reduced: the sum of 40*l.* mentioned in the 12th article must be construed as a penalty, and not as liquidated damages. Where there is any uncertainty or ambiguity in the terms of a stipulation of this kind, the Courts will lean against construing it as a stipulation for liquidated damages: *Horner v. Graves* (a), *Davis v. Penton*. The language of the present clause is similar to that which occurred in those cases, in which the sum was construed to be a penalty; and in *Davis v. Penton*, *Abbott, C.J.*, says:—"Whoever framed this agreement does not appear to have had any very clear idea of the distinction between a penalty and liquidated damages; for the sum of 500*l.* is described in the same sentence as a penal sum and as liquidated damages. Now, both expressions cannot be satisfied. We must therefore look to the whole of the agreement, in order to ascertain whether the 500*l.* was intended to be a penalty or liquidated damages." So here, looking at the whole agreement, especially at the clause immediately succeeding the 13th, which treats the 100*l.* also as a *penalty* to be recovered *as aforesaid*, i. e., as liquidated damages, it is impossible to collect a clear intention that either of these sums should be treated as liquidated damages. The 100*l.* certainly cannot, without breaking in upon the principle laid down in *Astley v. Weldon* (b), and *Kemble v. Farren* (c), that where articles contain covenants for the performance of several matters, and then one large sum is stated at the end as payable upon breach of performance, that must be considered as a penalty. And the same rule of interpretation must be applied to both the clauses.

(a) 7 Bing. 735; 5 M. & P. 768.

(b) 2 Bos. & P. 346.

(c) 6 Bing. 141; 3 M. & P. 425.

Lord ABINGER, C. B.—I think there is no ground for a rule on the first point; the partnership itself constituted a sufficient consideration for the very limited restraint of trade imposed on the defendant, which is of a kind that very usually follows on the formation of partnerships.

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PARKE, B.—As to the point made in arrest of judgment, *Hitchcock v. Coker* seems to have settled the law on this subject. The agreement is good if there be a sufficient consideration in law to support a contract; and the entering into a partnership, from which the party derives a benefit, is of itself a sufficient consideration to support any promise of this nature which he may choose to make. The partnership must last at least a month: and it is clear, since the case of *Hitchcock v. Coker*, that the Court cannot inquire into the extent or adequacy of the consideration.

BOLLAND, B., concurred.

On the other point, the Court took time to look into the agreement; and a few days afterwards,

Lord ABINGER, C. B., (having stated the facts) said:—The question turned upon this, whether or not the contract was for a penalty, or for liquidated damages? On examining the agreement, it seems to us that it must be taken as a contract for liquidated damages. There is nothing to shew that the parties contemplated the occurrence of particular damages, and intended to take the penalty so incurred as a settlement of the whole. We therefore think there ought to be no rule.

Rule refused.

and in remainder, one after another, in order and course as they respectively should be in seniority of age, and of the heirs male of the respective bodies of such sons respectively; and for default of such issue, to the use of his nephew Thomas Pickard, and his assigns, for and during the term of his natural life, [with remainder to trustees to preserve, as before, and with remainders in tail to his issue, as before]: and for default of such issue, to the use of his nephew, the Rev. George Pickard, clerk, (the defendant), and his assigns, for and during the term of his natural life, [with remainder to trustees to preserve, as before], with divers other limitations over in the said will particularly mentioned; and the said testator also by his said will gave and devised certain other manors, hereditaments and premises, in the said will secondly mentioned and therein particularly described, unto the said Francis John Browne and John Morton Coulson, their heirs and assigns, to the several uses, upon and for the several trusts, intents, and purposes, and under and subject to the several powers, provisos, conditions, and declarations thereafter limited, declared, expressed, and contained, of and concerning the same, that is to say, (amongst other things), as to all that his advowson, donation, and right of patronage and presentation, in and to certain rectories and parishes therein mentioned and particularly described, to the use of them, the said Francis John Browne and John Morton Coulson, their executors, administrators, and assigns, for the term of 99 years, to be computed from the day of his decease, upon the trusts therein mentioned; and as to the said advowsons and hereditaments comprised in the said term of 99 years, from and immediately after the expiration or other sooner determination of the said term, and in the meantime subject thereto and to the trusts thereof; and as to all other the said manors, hereditaments, and premises, secondly above devised, whereof no use was thereinbefore declared; to the use of his said

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nephew Thomas Pickard, and his assigns, for and during the term of his natural life, [with remainder to trustees to preserve, and with like remainders in tail as before], and for default of such issue, to the use of his said nephew George Pickard, and his assigns for and during the term of his natural life, [with remainder to trustees to preserve]; with divers other limitations over in the said will particularly mentioned. And the said testator by his said will further provided and declared, that it should be lawful for the several persons who for the time being should, by virtue of any of the limitations thereinbefore contained, be in the actual possession or entitled to the rents, issues, and profits of the said manors, hereditaments and premises thereinbefore firstly and secondly devised as aforesaid, or any of them or any part or parts thereof, by any deed or deeds, instrument or instruments in writing, with or without power of revocation, to be by them respectively sealed and delivered in the presence of, and to be attested by, two or more credible witnesses, or by their respective last wills and testaments in writing, or any codicil or codicils thereto, to be by them respectively signed and published in the presence of, and to be attested by, three or more credible witnesses, to grant, limit, or appoint unto any woman or women respectively with whom they should respectively have been married, or should respectively intermarry, for the life or lives of such woman or women respectively, and for her or their jointure or respective jointures, and in bar or without being in bar of her or their dower or respective dowers, any annual sum or yearly rent charge, annual sums or yearly rent charges, not exceeding in the whole the annual sum thereinbefore mentioned; that is to say, as to his said manors, hereditaments, and premises therein firstly devised, as hereinbefore mentioned, any annual sum or yearly rent charge not exceeding 250*l.*; and as to his manors, hereditaments, and premises therein secondly devised as herein-

before mentioned, any annual sum or yearly rent charge not exceeding 500*l.*, for the life or lives of any such woman or women respectively; such annual sums or yearly rent charges to be issuing and payable out of, and to be respectively charged and chargeable upon all or any part or parts of the said manors, hereditaments, and premises firstly and secondly devised as aforesaid, to be clear of all parliamentary and other taxes and deductions whatsoever, to be paid quarterly or half yearly, at such days or times and in such manner, and with such powers and remedies by distress and entry upon and perception of the rents, issues, and profits of the respective hereditaments which should be charged therewith, as the person or persons respectively exercising the said power should think fit, and should in manner thereinbefore mentioned direct or appoint: as by the said will, reference being thereto had, would appear. The information then stated, that afterwards, and in the lifetime of the said John Trenchard, to wit, on the 1st of January, 1819, the said William Trenchard, in the said will mentioned, died without issue, and that the said John Trenchard afterwards, and after the 31st day of August, 1815, to wit, on the 1st day of January, 1820, died without altering or revoking his said will as to the premises hereinbefore mentioned, leaving the said Thomas Pickard and the said George Pickard, in the said will respectively mentioned, him surviving; and thereupon the said Thomas Pickard, under and by virtue of the said will and of the said limitations therein contained, entered into and upon the manors, &c., by the said will firstly devised, and also into and upon the manors, tenements, and hereditaments by the said will secondly devised, and unto the receipt of the rents and profits thereof respectively, and remained and continued in such possession and in the receipt of the said rents and profits respectively, from thence continually until the time of his decease, as hereinafter mentioned, under and by

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virtue of the said will and of the said limitations therein contained as aforesaid. That the said Thomas Pickard afterwards, and whilst he was in such possession and in receipt of the said rents and profits as aforesaid, to wit, on the 6th day of November, 1829, made his last will and testament in writing, signed, sealed, published, and declared by him the said Thomas Pickard, in the presence of and attested by three credible witnesses, and thereby, in pursuance and by virtue of the power in that behalf given to and vested in him by the said will of the said John Trenchard, he did appoint unto and to the use of Harriet Pickard, then being the wife of the said Thomas Pickard, and to whom he had been and then was married, one annual sum or yearly rent charge of 250*l.*, of lawful money of Great Britain, during her natural life, the same to be issuing and payable out of, and charged and chargeable upon all and every of the manors, messuages, farms, lands, tenements, and hereditaments by the said will of the said John Trenchard firstly devised and limited as hereinbefore mentioned, and which the said Thomas Pickard had thereby power so to charge: and he thereby also appointed unto and to the use of his said wife Harriet, one other annual sum or yearly rent charge of 500*l.*, of like lawful money, during her natural life, the same to be issuing and payable out of, and charged and chargeable on, all and every of the manors, by the said will of the said John Trenchard secondly devised as hereinbefore mentioned, and which she had thereby power so to charge; and the said Thomas Pickard thereby directed and appointed that the said two several annual sums or yearly rent charges of 250*l.* and 500*l.* respectively, should be paid to his said wife and her assigns, at or in the common dining-hall of Lincoln's Inn, in the county of Middlesex, by equal quarterly payments, clear of all parliamentary and other taxes and deductions whatsoever, the first of such quarterly payments to be made at the expiration of three calendar

months next after the decease of the said Thomas Pickard; as by the said will of the said Thomas Pickard, reference being thereto had, would more fully appear. That the said Thomas Pickard afterwards, and more than four years before the exhibiting of this information, to wit, on the 1st of September, 1830, died without issue male, and without altering or revoking his said will as to the said appointment hereinbefore mentioned, leaving the said Harriet Pickard, and the said George Pickard, respectively, him surviving; and thereupon afterwards, and more than four years before the exhibiting of this information, to wit, on, &c., the said defendant George Pickard entered into and upon the said manors, tenements, and hereditaments, by the said will of the said John Trenchard firstly and secondly respectively devised as hereinbefore mentioned, and into and upon the possession thereof, and then became and was and thence continually hath been so possessed and entitled to the said several manors, &c., according to and under and by virtue of the said will of the said John Trenchard, and of the limitations therein contained; subject to the said legacies, by way of annuities, as appointed to be paid to the said Harriet Pickard, as aforesaid. That the said Harriet Pickard was a stranger in blood to the said first mentioned testator, and that at the time of the death of the said Thomas Pickard, to wit, on, &c., the said Harriet Pickard was of the age of 66 years and no more; and also that the value of the said two legacies, so given by the way of annuities to the said Harriet Pickard, as aforesaid, according to the statute in such case made and provided, then and there amounted in the whole to a large sum of money, to wit, the sum of 5,616*l.*, and also that the duties which should and ought to have been paid for and in respect of the said bequests to the said Harriet Pickard, then and there amounted to a large sum of money, to wit, the sum of 561*l.* 4*s.* That the said defendant George Pickard, having entered into

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and become possessed of the rents and profits of the said several manors, &c., hereinbefore mentioned, and entitled to the same as aforesaid, subject to the said bequests to the said Harriet Pickard, heretofore, and before the exhibiting of this information, did pay and satisfy unto the said Harriet Pickard the said annuities so appointed to the said Harriet Pickard as aforesaid, for and during the space of four years next succeeding after the death of the said Thomas Pickard, to wit, on the several days and times and by the payments in that behalf directed and appointed as aforesaid, without having received or deducted the duty chargeable thereon as aforesaid, the said duty not having been first duly paid to his Majesty: whereby, and by force of the statute in such case made and provided, the said defendant George Pickard, so being entitled to the said several manors, tenements, and hereditaments as aforesaid, subject to the said last mentioned legacies, became and was, and still is liable to pay to his said Majesty, the said sum of 561*l.* 4*s.*, being the amount of the said duty so due and payable in respect of the said legacies.

The second count was for penalties for paying the annuities without taking proper stamped receipts; the third was in indebitatus assumpsit for duties, and the fourth on an account stated.

The defendant demurred to the first count, and to the others pleaded nil debit.

The points for argument on the part of the defendant were as follows:—The defendant contends that as Mrs. Pickard, the jointress, was not an object of the bounty of the testator John Trenchard, the legacy duty does not attach: that the case is neither within the letter nor the spirit of the legacy duty acts, as Mrs. Pickard is neither specially named nor described in the will of John Trenchard.

The Attorney-General's points for argument were as

follows:—The Attorney-General claims the payment of duty under the 55 Geo. 3, c. 184, sched. part 3, title Legacy; 45 Geo. 3, c. 28, ss. 4 and 5, and 36 Geo. 3, c. 52, s. 8; and intends to argue:

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1. That Mrs. Harriet Pickard, the appointee of the powers created by the will of John Trenchard, took the annuities in the first count mentioned by the gift of John Trenchard; and

2. That the defendant is the person chargeable with such duty, he being entitled to the real estate in the first count mentioned, subject to the said annuities.

The demurrer was argued in Hilary Term, by

Erle for the defendant.—Legacy duty is not payable by the defendant in respect of the rent charges appointed to Mrs. Pickard. The only direct objects of the bounty of the original testator, John Trenchard, were the successive tenants for life mentioned in his will. To them he gives estates for life, and annexes to such estates the power, which was to be exercised for their benefit, of jointuring any wives whom they might thereafter marry. The testator contemplates the probable devolution of the estates through a series of tenants for life, some of whom were not then married, and he gives to them, as part of his bounty, the power to contract a marriage suitable to the degree of the parties who should be in the possession of manors and estates of the extent devised by his will, and to make, in return for any portion which the husband might receive on such marriage, an adequate provision for the wife during her life. That which passes from the original testator is not a gift of any money; he parts only with an estate for life in certain manors and lands, and adds to each estate for life a power to raise a rent charge, if necessary, and to deduct the amount of it out of the estate of the succeeding tenant for life. On this state of circumstances, the question is, whether the Crown is entitled to

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legacy duty on those rent charges, so created; under the words of the Stamp Act, 55 Geo. 3, c. 184, sched. part 8, title Legacies, &c. They are as follows:—"For every legacy, specific or pecuniary, or of any other description, of the amount or value of 20*l.* or upwards, given by any will or testamentary instrument of any person who shall have died after the 5th day of April, 1805, either out of his or her personal or moveable estate, or out of or charged upon his or her real or hereditary estate, or out of any monies to arise by the sale, mortgage, or disposition of his or her, real or heritable estate or any part thereof, and which shall be paid, delivered, retained, satisfied, or discharged after the 31st day of August, 1815," the respective duties therein mentioned. And it is afterwards declared, that all gifts of annuities, or by way of annuity, or of any other partial benefit or interest, out of any such estate or effects as aforesaid, shall be deemed legacies within the intent and meaning of the schedule. The words being "any legacy, specific or pecuniary, given by any will," &c.; it is most material to see whether, by the will, any gift of money was made. Now here there was no present gift of money, but only the grant of the power to create a rent charge, which would be money when created and raised. If any money is ultimately taken out of the estate of this testator, it is not by the act of the testator, but by the tenant for life for the time being, who may choose to call the power into exercise.

There are, however, other statutes which will be referred to as giving the right to duties in this case, viz. the 45 Geo. 3, c. 28, s. 4, and the 36 Geo. 3, c. 52, s. 7. The former statute enacts, "That every gift by any will, &c., of any person dying after the passing of this act, which by virtue of any such will, &c., shall have effect or be satisfied out of the personal estate of such person, or out of any personal estate which such person shall have power to dispose of as he or she shall think fit; or which shall

have been charged upon or made payable out of any real estate, or be directed to be satisfied out of any monies to arise by the sale of any real estate of the person so dying, or which such person may have the power to dispose of, whether the same shall be given by way of annuity or in any other form, shall be deemed and taken to be a legacy, within the true intent and meaning of this act. Provided always, that nothing herein contained shall be construed to extend to the charging with the duties by this act granted; any specific sum or sums of money, or any share or proportion thereof, charged by any marriage settlement, or deed or deeds, upon any real estate, in any case in which any such sum or sums, or share or proportion thereof, shall be appointed or apportioned by any will or testamentary instrument, under any power for that purpose given by any such marriage settlement, deed or deeds" (a). This clause appears to have little application to the present case, but to apply only to the case of a gift of money by the will, but which is charged on the real estate. The 36 Geo. 3, c. 58, s. 7, declared, that "any gift by any will &c., of any person dying after the passing of this act, which shall, by virtue of such will, have effect or be satisfied out of the personal estate of such person, or out of any personal estate which such person shall have power to dispose of as he or she shall think fit, shall be deemed and taken to be a legacy within the intent and meaning of this act, whether the same shall be given by way of annuity or in any other form, and whether the same shall be charged

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(a). Section 5 enacts, that the duties thereby granted on legacies, or charged upon or made payable out of any real estate, or out of any monies to arise by the sale of any real estate, &c., shall be accounted for, answered, and paid by the trustee or trustees to whom the real estate shall be devised out

of which the legacy or legacies, &c., shall be to be paid or satisfied; or, if there shall be no trustees, then by the person or persons entitled to such real estate, subject to any such legacy, or by the person or persons empowered or required to pay or satisfy any such legacy.

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only on such personal estate or charged also on real estate of the testator or testatrix who shall give the same, except so far as the same shall be paid or satisfied out of such real estate, in a due execution of the will." The intent of both these statutes plainly was, that the duty should be laid on money received from the gift of the testator, and that it should be levied on the party receiving it. But here it is attempted, by a forced construction, to levy the duty on a party standing in a totally distinct situation—not a donee of the testator of any money; if it can be claimed in this case, a party might equally be called upon to pay it who was in possession of the estate after many transactions for a valuable consideration might have intervened. Suppose the will had given the power to the tenant for life to create this rent charge, not in favour of the wife, but of any stranger, would the party taking under the appointment so made have been liable to duty? If the argument be well founded, that the duty attaches wherever there is a power to create the annuity, the children of the marriage would equally be liable to duty. But that is not sufficient—it must appear that there is a gift of money by the testator to the party from whom the duty is claimed.

The cases which have been decided on this subject are all distinguishable from the present. In *The Attorney-General v. Jackson* (a), a testator gave a life estate in his freehold property to C. T., and after her decease, and in the event of her husband J. T. surviving her, he gave him an annuity or yearly rent charge of 500*l.*, payable quarterly, with such power and remedy of distress and entry, and perception of rents, in case the annuity should be in arrear, as are reserved to the lessors for the recovery of rents on leases for years; and subject to that annuity, he gave his real estates in moieties to R. J. in fee, and to

W. J. for life; it was held that legacy duty was payable upon the devise to J. T., by R. J. and W. J., the parties interested in the land subject to the annuity. There the testator himself specified the sum to be given, and the party to whom it was given; and the only ground on which it was sought to exempt it from legacy duty was, that it was not an annuity within the meaning of the acts, but an actual rent charge, and therefore a devise of a real interest. The same distinction applies to the case of *Stow v. Davenport* (a), which was very similar in its circumstances; the only difference being that there the testator gave the tenant for life a discretion to limit the amount of the charge, to the extent of 500*l*. So, also, in *Hales v. Freeman* (b), the object of the bounty was specified; there was a gift of a particular annuity to a particular individual. Those authorities, therefore, do not govern the present case.

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It will be argued on the other side, that the instrument executing the power is to be taken as a part of the instrument creating the power, and therefore that the will and the appointment in this case are to be read as one instrument. There are, however, several authorities in which it has been laid down, that such instruments are separate and distinct, when executed at different times, and under different circumstances: *Bartlet v. Ramsden* (c), *Hurd v. Fletcher* (d), *Scrafton v. Quinecy* (e), *Duke of Marlborough v. Lord Godolphin* (f). The cases are collected in 2 Sugd. Powers, 22. How can Harriet Pickard be considered as taking by the gift of John Trenchard, to whom she was an entire stranger, and who died many years before, so as to create a liability to the payment of 10 per cent. on the amount?

No argument can be drawn, in support of this claim,

(a) 5 B. & Ad. 359.

(b) 1 B. & B. 391; 4 Moore, 21.

(c) 1 Keb. 750.

(d) Dougl. 43.

(e) 2 Ves. sen. 413.

(f) Id. 61.

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from the 18th section of the 36 Geo. 3, c. 52, as that does not relate to charges on land, but only to legacies given subject to powers of appointment for the benefit of persons who shall be "specially named or appointed as objects of such power:" then each particular taker is chargeable with duty as his interest comes in esse; according to the amount of interest limited to him. The claim afterwards proceeds—"And where any property shall be given for any limited interest, and a general and absolute power of appointment shall also be given to any person or persons to whom the property would not belong in default of such appointment, such property, upon the execution of such power, shall be charged with the same duty, and in the same manner, as if the same property had been immediately given to the person or persons having and executing such power." That is the case of a legacy given to the party, plus the absolute power of appointment: in such case, the power is treated as an extension of his legacy, and it is chargeable at once, in his hands, with the whole duty, the whole corpus being placed at his disposal. This, on the contrary, is a devise of land plus the power of appointment, which is an extension of that devise; it is altogether different from the case of a legacy given for a limited interest, with a power of appointment, amongst objects specially named, superadded. The land being subject to no duty, the power of raising the charge on it, which is only an extension of the devise of the land, should be considered also as liable to no duty. Suppose it had been a devise of an estate for life, with a power of granting such leases as would enable the wife to obtain, during her life, an income of 750*L.* a year, which would only be a more circuitous mode of obtaining the same result—could it be said that such power, when exercised, was a gift of money, and subjected the party to legacy duty? This being therefore, merely a devise of a freehold interest in land, with a power of granting a rent charge out of it, it is sub-

mitted that legacy duty does not attach on that power being exercised.

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The Solicitor-General, for the Crown.—The case turns entirely on the construction to be put upon the 36 Geo. 3, c. 52, s. 7, and the 45 Geo. 3, c. 28, s. 7; or rather wholly upon the latter statute. It does not alter the nature of the case that this is a gift of real estate to the successive tenants for life. On the gift of land there is no legacy duty; but on charges upon land the duty is payable, and whenever such a charge comes in case, whatever was the nature of the original devise, the duty attaches upon that charge. The real question, therefore, is, whether this is a charge upon the land, within the meaning of the statute. [*Parker, B.*—It is clear that the 45 Geo. 3, is to be construed as if all the provisions of the 36 Geo. 3, were repeated in it, with reference to legacies charged on land (a). Suppose, therefore, this, instead of being a gift of real estate, had been a gift of personal or leasehold estate to trustees, on trust to pay the rents or annual proceeds to William Trenchard for life, with remainder to his children, then with remainder to Thomas Rickard for life, and after his death to his children, with power to him to appoint 750*l.* a year to his wife; and the case were to be considered wholly with reference to the stat. of 36 Geo. 3, c. 52; could it be contended that that sum would not be a gift of money subject to duty? It is said that this is not a gift which the party takes by virtue of the original will, but by virtue of the will and of an act done afterwards, namely, the testamentary instrument executed by Thomas Rickard. The answer is, that it is taken under the will, according to the true intent of the statute. Suppose a legacy given to the Lord Mayor of London for the next year—or to the Lord Mayor, if the Sheriff of London should say he ought to have it,—would not that be subject to duty? Or if a party were desirous of providing for all

(a) See s. 9 of the 45 Geo. 3, c. 28.

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the children of A. B., could he avoid the legacy duty by making it a gift to them "if A. B. should think fit that they should take it?" The interposing of the instrumentality of a third person, on whose act the party is to take, cannot make it the less a gift by the testator. There would therefore be little room for doubt, if the case rested entirely on the 7th section of the 36 Geo. 3, that as soon as the husband manifested his intention that the wife should take the charge, that would be a charge which, by virtue of the will, took effect and was satisfied out of the estate of the testator. But the 18th section exhausts every possible case of appointment under powers. There are but three cases of power and appointment that can be suggested: 1. Where a limited interest is given to a party, with a power, subject to that interest, to appoint to certain restricted classes; 2. Where a limited interest is given, with an absolute power of appointment as the devisee may think fit; and 3. Where a limited interest is given to one party, with a power of appointment given to another party. Then the former clauses having provided for the payment of duty where legacies are given in succession, the 18th section provides, "that where any legacy, &c., shall be subjected to any power of appointment, to or for the benefit of any person or persons specially named or described as objects of such power, such property shall be charged with duty as property given to different persons in succession." If, therefore, a limited interest be given to a person for his life, with a power at his death to appoint to his wife, with remainder to his children, and he does so appoint, then they take in succession, and so taking, pay duty according to their respective interests. It cannot be the meaning of the act that the individual to take must be named by the testator; the words "specially named or described as objects of such power" mean only parties who fill a particular character designated in the will, as wife or children, and so specially described as objects

of the testator's bounty. The clause goes on to provide, that "in so charging such duty, not only the person and persons who shall take previous or subject to such power of appointment, but also any person or persons who shall take under or in default of any such appointment, when and as they shall so take respectively, shall, in respect of their several interests, whether previous or subject to, or under or in default of such appointment, be charged with the same duty, and in the same manner, as if the same interests had been given to him, her, or them respectively in and by the will or testamentary disposition containing such power, in the same order and course of succession as shall take place under and by virtue of such power of appointment, or in default of execution thereof, as the case may be." That is to say, the duty shall be charged just as if there had been a gift to Thomas Pickard for life, with remainder, as to 750*l.* a year, to his wife for her life, with remainder to children, if there had been any, and with remainder over. The same section, in its subsequent clauses, provides for the cases of a gift of a limited interest with a general and absolute power of appointment, and of a gift, with a power of appointment to a party who, in default of appointment, would take over. The *land itself* here is liable to no duty, but the charge is. Suppose personal estate were bequeathed to a member of the royal family, (who are exempt from legacy duty), with a power at his death to appoint an annuity to a servant, and he appointed an annuity of 750*l.* accordingly, that would be in principle an exactly analogous case; but can it be doubted that that would fall within the first clause of the 36 Geo. 3, c. 52, s. 18? The case of a devise in fee, with a power of appointment superadded, is different; there no duty would be payable, because the power would be nugatory by reason of the testator surrounding the charge (if it may be so described) both before and after, with a gift of the corpus, which would be liable to no

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duty. The cases of *Attorney-General v. Jackson*, and *Stow v. Davenport*, clearly establish that the same principle applies, whether the power is to appoint out of personal or real estate, although no duty is chargeable directly on the latter. The object of the 45 Geo. 3, c. 28, was to make land, whenever it came into the shape of money, liable to the duty. The 4th section intended to assimilate real and personal estate for this purpose, in case of succession, and the duty is charged on the successive parties, as their several interests come in esse. [Lord Abinger, C. B.—I think the real question is, whether this is not the creation of a charge by Thomas Pickard, and not by the original testator].

Erle, in reply.—This is the creation of a charge by Thomas Pickard. It is impossible to construe it as a gift by John Trenchard to Harriet Pickard. The defendant has a right to argue that, on Thomas Pickard's becoming actual tenant for life, he might have entered into a treaty with his intended wife as to the terms on which he would exercise this power of jointuring, and that her relatives might have advanced a considerable sum in consideration of the grant of the charge of 750*l.*; and she would then be, to all intents and purposes, a bona fide purchaser of the rent-charge for its value. Could the Crown afterwards say to her, "You are in the receipt of a gratuitous gift of 750*l.* per annum from a stranger in blood, and therefore you are chargeable with 10 per cent. on the total value?" It is clear that when the property which passes under the will is realty, no legacy duty is payable; and that when it is personalty, legacy duty attaches on the corpus: and this distinction removes the difficulty created by the 18th section of the 36 Geo. 3. In the cases there contemplated, it is not a fund given absolutely, but to successive parties in different proportions: the fund is given with provision for the interest of each in succe-

sion: then the statute says that each legatee shall pay his legacy duty according to his interest, and the party to whom the property is first given, though for a limited interest, shall pay the whole, if he has an absolute control over the fund: and further, they must be persons specially described by the testator as objects of *his* bounty. The meaning of the legislature is this:—the party who is to exercise an absolute power of appointment has in effect the whole beneficial interest in him; it is for his benefit that it is to be subjected to the charge which he has a power to impose; but *ex concessis*, *that* party is not liable to any duty, when the devise to him is of real estate, though with such an absolute power annexed to it. It is clear that here the corpus is not liable to duty at all, and under the 36 Geo. 3, this annuity would not be chargeable, being money charged on land. Under the 45 Geo. 3, again, in order to be chargeable with duty, it must be a gift of money passing from the original testator, charged upon his land. Nothing can be brought within the operation of that act, unless the Court be satisfied that the testator gave money chargeable on his land. The object of the statute was to impose a duty on *legacies*: then the 4th clause introduces the word “gift;” which therefore means a gift of money by the testator to a particular individual, in the nature of a legacy. Here it is essential, to give Harriet Pickard any right to take the 750*l.* a year, that another legal instrument should be executed to her; and according to the case of *Duke of Marlborough v. Lord Godolphin*, she takes in consequence of that subsequent instrument. It is merely a fraction of the corpus—the land—that can by possibility be contended to have come to her, and that she takes, not as a donee or legatee of John Trenchard, the original testator, but by the gift of her husband.

With regard to the 9th section of the 45 Geo. 3, which incorporates the provisions of the 36 Geo. 3, that would

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apply where the corpus of the property had been made chargeable by the later act, but not otherwise; and if this testator had created a rent charge of 750*l.* per annum, and given it to Mrs. Pickard, it could not be contended that that would not have been liable to duty under the 46 Geo. 3. But this is merely a gift of real property, with a power to create a rent charge, which is a freehold right, annexed to the several estates for life created by the will.

Cur. adv. vult.

In this term, the judgment of the Court was delivered by—

Lord ABINGER, C. B.—This was an information filed by the Crown for the purpose of recovering legacy duties, and the question upon the demurrer arose upon these facts. By the will of a gentleman whose name was mentioned in the pleadings, there was a power to each tenant for life in succession to charge the estates with certain annuities, amounting altogether to 750*l.* a year, by way of jointure. It seems that the estate came into the hands of Mr. Pickard, and the question was, whether this charge is liable to legacy duty. The case was ably argued on both sides, and we are of opinion that the Crown is entitled to judgment on this demurrer.

There can be no doubt that an annuity is, by the definition in the Legacy Act, a legacy: the question is, whether this annuity, or legacy, must be considered as charged upon the real estate by the testator who exercised that power. Nothing can be better settled than the general rule, that interests created by the execution of a power take effect precisely in the same manner as if created by the instrument which gives that power. This was admitted by the defendant's counsel in argument, but he contended that there were exceptions to this rule, which he

said was at best but a fiction of law, and that whenever the substantial ends of justice required it, an exception should take place. But the only exceptions to the general rule are, first, where the question of time becomes important: thus, in the case of the *Duke of Marlborough v. Lord Godolphin* (a), it was held by Lord *Hardwicke* that the person taking, by execution of a power, whether realty or personalty, takes under the authority of that power, and in the like manner as if his name and interests had been specified in the instrument giving the power; but not from the date of the power. Thus, Lady Sunderland, who had a power, by the will of her husband, to appoint by her own last will and testament, the sum of 30,000*l.*, in which she had an interest for life, to such of his children as she thought proper, having by her will appointed portions amongst the children, of whom two died in her life-time, it was held by Lord *Hardwicke* that there was no appointment whatever respecting these, and that she must be taken so to have intended, as she did not upon her death alter her will. In that case, therefore, the children who did take under the power, took in the like manner as if they had been appointed by their father's will creating the power, to take their respective shares upon the death of Lady Sunderland.

The second exception is, when the instrument executing the power has not been duly registered, the land being in a register county, to avoid mesne incumbrances; that was the case of *Scrafton v. Quincey* (b), where a party having executed by deed a power to charge his lands, afterwards, and before the deed was registered, granted a mortgage of the lands to secure money borrowed. It was held by the Master of the Rolls that the case was precisely within the terms of the Register Act, and was a question of priority between two incumbrancers.

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(b) Id. 413.

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The third case of exception is that of an execution of a power to convey lands, under such circumstances as to make the conveyance fraudulent under the statute of Elizabeth. This is said by counsel, arguendo, in *2nd Vesey*, 65, to have been considered by Lord *Hardwicke* as a conveyance of lands within that statute; but this is only to say that a man cannot so execute his power to convey his lands, as to commit a fraud upon his creditors, if he be a trader, or upon a *bonâ fide* purchaser for value.

These two last exceptions are obviously founded upon justice, and mean no more than this, that as the time when the power is to take effect need not be specified in the instrument creating it, the instrument which executes it may be considered as distinct, for the purpose of avoiding fraud, or preventing the evasion of an act of Parliament. But this exception neither in form nor in principle has the least resemblance or relation to the present case; and as there is nothing in the statute which imposes the duty upon legacies charged upon land, to shew that any thing more or less is meant by those words than their ordinary signification, it appears to us that the annuity in this case, being a legacy, was charged upon the real estates mentioned in the pleadings, by the will which created the power to charge, in like manner as if the person to whom it was given by the execution of the power, had been mentioned by name as the object of the testator's bounty in the will which gave the power. We think, therefore, that the judgment ought to be for the Crown.

Judgment for the Crown.

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ASSUMPSIT.—The declaration stated, that heretofore, and before the making of the promise and agreement hereinafter mentioned, the plaintiff had brought and commenced an action against the defendant, as executor of Jane Carter deceased, for the recovery of a debt of 317*l.* 10*s.* then due from the defendant, as executor as aforesaid, to the plaintiff, and was set down for trial at the sittings after Michaelmas Term, 1834; and that afterwards, to wit, on the 12th day of December, 1834, in consideration that the plaintiff would withdraw the record, and pay his own costs, in the said action, and take no further proceedings till assets of Jane Carter should come to the defendant's hands, the defendant agreed that he would pay to the plaintiff, in part discharge of the said monies so due to the plaintiff as aforesaid, the sum of 100*l.* within a week, and the residue thereof out of the assets which should first come to his hands as executor of the said Jane Carter deceased. The declaration then averred mutual promises, and alleged that the plaintiff withdrew the record, &c. accordingly, and that, although the defendant paid the said sum of 100*l.*, and although certain assets of the said Jane Carter, sufficient to satisfy the residue of the monies due to the plaintiff, afterwards, and after the making of the said agreement, came to the hands of the defendant, he had not paid the same, contrary to his said agreement, &c. Pleas, first, non-assumpsit; secondly, that no assets of the said Jane Carter came to the

A. had commenced a suit in Chancery for an account under a will, in which she employed as her solicitors, first, B, then C., who successively gave up the suit, and then D., who continued to conduct it till her death in 1829. After her death, E., her executor, filed a bill of revivor, and D. continued to conduct the suit for him. In 1833, a decree was made, whereby it was ordered that the Master should settle the costs of all the parties, and that the same, when taxed and settled, should be paid out of the fund in the following manner: viz., the plaintiff's costs (consisting of the costs both of A. and E.) to D., his solicitor, and the

costs of the defendants to their several solicitors. The plaintiff's costs were taxed, and certain sums in respect of them were paid to D. C. sued E., as executor of A., for the amount of his bill, and had judgment of assets *quando acciderent*. He afterwards brought another action on the judgment, and had given notice of trial; and it was then agreed between them, that, on C.'s withdrawing the record, E. would then pay him 100*l.* on account of his bill, and the remainder out of the assets which should first come to his hands as executor of A.; and the record was accordingly withdrawn. A further sum was afterwards paid out of the Court of Chancery to D. in respect of the same costs:—*Held* (by Parke and Alderson, Bs., Lord Abinger, C. B., dissentiente), that this sum was assets in the hands of E., within the meaning of the agreement.

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hands of the defendant, in manner and form, &c.; on which issues were joined.

At the trial before Lord *Abinger*, C. B., at the Middlesex sittings after Trinity Term, 1837, the following appeared to be the facts. Jane Carter, the defendant's testatrix, had instituted, many years ago, a suit in the Court of Chancery against the executors and certain legatees of annuities under the will of her father, for the purposes, amongst others, of having her rights under the will declared, and for an account of the testator's estate: She employed as her solicitor in this suit, first a Mr. Jones, then the present plaintiff, Mr. Smedley, both of whom successively gave up the conduct of it, and afterwards a Mr. Johnson, who continued to act as her solicitor up to her death, in 1829. After her death the present defendant, Mr. Philpot, whom by her will she had appointed her executor, filed a bill of revivor against several representatives of defendants in the suit, who had died; and Mr. Johnson continued to conduct it as his solicitor. In the year 1833, a decretal order was made in the cause by the Master of the Rolls, Sir John Leach, whereby the rights of the several parties were declared, and it was ordered (amongst other things) that the Master should settle the costs, charges, and expenses of all the parties, and that the same, when taxed and settled, should be paid out of the fund in Court in the following manner, viz.: the plaintiff's (the now defendant's) costs to Mr. Johnson, his solicitor, and the costs of the several defendants to their respective solicitors (naming them); and if the fund was insufficient, the balance was to be paid by the receiver of the devised estates to the different solicitors, in proportions to be settled by the Master: and it was also declared, that the costs ought to be borne by the several persons interested in the annuities bequeathed by the will, and the residuary estate of the testator, and the personal representatives of such of the persons so interested as were dead, rateably

and in proportion to the amounts of their several annuities and shares of the residue. The Master taxed the costs of the plaintiff in the suit (the now defendant) at 678*l.* 3*s.* 6*d.*, the sum so taxed being made up of the costs of Jane Carter in her lifetime, and of the defendant as her executor. It turned out, however, that the fund in court was insufficient for the payment of the several claims upon it, and the bill was abated accordingly: the sum of 485*l.* 3*s.* 11*d.* being apportioned by the Master to be paid as a proportion of the plaintiff's costs, the residue to be paid from the annual balances of the receiver appointed in the cause. Mr. Johnson afterwards received, out of the fund in court, the above sum of 485*l.* 3*s.* 11*d.*, and subsequently, from the receiver's balances, several sums amounting to 130*l.* 7*s.* 8*d.*, of which 84*l.* 8*s.* 8*d.* was paid to him after the date of the agreement after mentioned, on account of these costs. Mr. Smedley, the present plaintiff, after the date of the decree, commenced an action against the defendant as executor of Jane Carter, for the amount of his bill, and obtained judgment of assets *quando accederint*. He subsequently brought another action on that judgment, in which he had given notice of trial: and on the 12th of December, 1834, the plaintiff and defendant entered into a written agreement, whereby, in consideration of the plaintiff's withdrawing the record and paying his own costs, the defendant agreed to pay him the sum of 100*l.* on account of his bill within a week, and the remainder out of the first assets which should come to his hands as executor of Jane Carter: and the proceedings were discontinued accordingly. It appeared also that the defendant would have been willing to pay the plaintiff the amount of his bill out of the several monies so received by him, but that he was informed by Johnson that the plaintiff had commenced an action against him; whereupon the defendant desired Johnson to pay Jones's bill, which he accordingly did. After payment of Jones's bill, and after retaining the amount of his

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own, it was stated, that he (Johnson) had accounted with the defendant for the remainder of the money received by him, but it did not specifically appear in what manner.

On this evidence, the Lord Chief Baron was of opinion that some of the monies so paid out of the Court of Chancery were assets in the hands of the defendant, within the meaning of the agreement, and accordingly directed a nonsuit. In the following term, *Kelly* obtained a rule nisi for a new trial, on the ground of misdirection, against which, in the same term,

Plett and Hunfrey shewed cause.—This money was not assets within the meaning of the agreement on which the plaintiff has declared. The defendant has received no money himself in his character of executor; nor had he any right to receive it, the order of the Court being that it should be paid to Johnson, for the specific purpose of discharging the costs due to him and to the other two solicitors who had been employed by the successive plaintiffs in the suit. If the plaintiff has any claim to any part of that money, it is Johnson, and not the defendant, who is responsible to him. The question, however, is not whether the defendant may or may not be, in some form, liable to the plaintiff, but whether any part of this fund is *assets* in his hands. Assets derived from a Chancery suit must be the resulting fund after payment of the specific funds directed to be satisfied: costs in equity do not follow the judgment, as at law, but are in the discretion of the Court. If this had been an action against the defendant for a debt of his testatrix, to which he had pleaded plene administravit, would this payment to Johnson have been evidence of assets? The effect of the decree clearly is to make Johnson a trustee or stakeholder for all parties: if not, in what a position is the defendant placed, who has no right to appropriate any portion of the money, or to recover it out of Johnson's hands, and yet is to be liable as if it had come to his own hands as assets? Even supposing the

fund to have come into the possession of the defendant, yet, inasmuch as it is applicable to a specific purpose, he could not employ it as general assets: *Hassall v. Smithers* (a), 2 Wms. Executors, 1193. The consequence of holding otherwise would be, that though clearly intended to be paid over to the plaintiff and Jones, the money may be intercepted by the claims of creditors of higher degree.

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Kelly and Mansel, contra.—The question is, in what character the money was received by Johnson, under the terms of the decree: and it is submitted that it was paid to him, not as a trustee for all the parties interested, but as the solicitor and agent of the defendant, the plaintiff in the equity suit. He had a lien upon it, it is true, for the amount of his own bill, but as to the residue, he received it merely as the agent of the defendant. It is *the client* who receives the costs, in his own right, by the judgment of the Court, from the opposite party; he is merely indebted to his attorney or solicitor for their work and labour; the money is not in any sense received to their use. Costs are most frequently paid into the hands of the attorney, but he receives them merely as the agent of the client. It must be averred and pleaded as a payment to the client. Supposing, therefore, that the equity suit had been terminated in the lifetime of Mrs. Carter, it is clear that this payment, though in fact made to the attorney, would have been payment to her. Then the suit is continued by the defendant, who conducts it by a third solicitor, Johnson; and he continues to act until a decree is made, under which several parties are entitled to costs of suit, and amongst them Mrs. Carter—i. e. the present defendant. The decretal order, then, gives no distinct right to Johnson in his own capacity, but merely amounts to the common direction that costs shall be paid to the party in

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the cause, by his solicitor; as in the case of rules, awards, &c., in the courts of common law. But further, there was evidence that Johnson actually settled the balance, after paying himself and Jones, in account with the defendant. Supposing, then, the defendant is to be taken to have received the balance, after satisfying Johnson's lien, the next question is, whether he did not receive it as assets. He received it as the party in the cause, and the party—the executor—whom the plaintiff had the right to sue for his debt: and not having paid it over, it must be assets in his hands.

Cur. adv. vult.

The learned judges differing in opinion, now delivered their judgments seriatim.

ALDERSON, B.—In this case the defendant, by the agreement stated in the declaration, undertook to pay the debt due to the plaintiff from the estate of Jane Carter, out of the first assets that should come to his hands as executor; and the question is, whether, subsequently to this agreement, any such assets have come to his hands. The contract was made on the 12th of December, 1834. It appeared that many years ago, the testatrix had filed a bill in equity, for relief in respect of certain claims which she had upon the estate of a deceased person. This suit was at first conducted by a solicitor named Jones, who had, during her life, discontinued proceeding with it, his bill remaining unpaid. The cause was then taken up by the plaintiff as her solicitor, and a similar result took place. Lastly, it was conducted by Mr. Johnson, who remained solicitor till the death of the testatrix. The suit was then revived by the defendant as her executor, and conducted by Johnson as his solicitor, to a decree. A decree was made in 1832, by the Master of the Rolls, by which he ordered the costs of the parties

ad the suit to be taxed by the proper officer, and paid out of the fund in Court. This decree directed that the defendant's costs should be paid to his solicitor, Mr. Johnson. Under this decree, the costs, which included those of Jones, of the plaintiff, and of Mr. Johnson, were accordingly taxed altogether; amounting to 678*l.*; but the fund in Court proving insufficient, the costs of the different parties were reduced rateably, and ultimately the sum of 485*l.*, or thereabouts, was paid by the officer of the Court of Chancery to Mr. Johnson, as the defendant's costs, (including the whole costs incurred in the lifetime of the testatrix), in that suit. And after deducting the whole amount of the costs due to Mr. Johnson, both as solicitor for the defendant in that suit, and as solicitor for the testatrix in her lifetime, there remained in Mr. Johnson's hands a sum considerably exceeding the plaintiff's demand, and out of which, by the defendant's desire, Johnson paid the bill due to Mr. Jones, and afterwards settled the remainder in account with the defendant, either by paying it to him, or to other persons by his desire. It distinctly appeared that Johnson had, subsequently to the 12th of December, 1834, received 84*l.* 8*s.* 8*d.*, part of the money in question, from the officer of the Court of Chancery.

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Now, upon these facts, the plaintiff contends, that all the amount received by Johnson, exceeding his lien for his own bill, was assets in the hands of the defendant; and, after full consideration, I have come to that conclusion. In Sheppard's Touchstone (a), assets are thus defined—"All those goods and chattels, actions and commodities which were of the deceased in right of action or possession as his own, and so continued to the time of his death, and which after his death the executor doth get into his hands, as duly belonging to him in the right of

(a) P. 496.

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his executorship, and all such things as do come to the executor in lieu or by reason of that, and nothing else, shall be said to be assets in his hands, to make him chargeable to a creditor or legatee."

It is perfectly clear that it is not necessary in all cases, that the money or chattels shall have come to the actual possession of the executor. It is sufficient if it be in his power to receive them, and he has actually dealt with them as received. As if damages to the testator's estate under an award be released by the executor, the release is equivalent to a receipt; so, if the money come into the hands of his agent, and he directs him to pay it over to a third person, the payment by the agent is in fact a payment by him, and the money so paid must be considered as having come to the hands of the executor.

Here, therefore, if the monies paid to Mr. Johnson were in the nature of assets, the direction to pay a part over to Jones, and the settling the balance afterwards in account between Johnson and the defendant, would make this money assets in the hand of the defendant. The question then is, what was the nature of this money which came to the hands of Johnson.

Let us see how the estate of the testatrix stood at the time of her death. It was liable to the three attorneys for the amount of their bills of costs; no doubt can be entertained as to that. On the other hand, the estate had a claim to be reimbursed in respect of these bills out of the fund in the Court of Chancery, depending on the course of that Court, and to be determined by the Judge of that Court, on the principles governing courts of equity. It seems to me that this, according to the definition above cited, was "a commodity which was of the deceased, in right of action, as her own, at the time of her death." It can make no difference, I think, in principle, whether the testatrix had paid, or was still liable at the time of her death to pay, those bills, the amount of which constituted

this claim. In an action for damages arising out of an injury, a plaintiff recovers equally the damages which have been paid, and those which he has incurred a liability to pay. No distinction is ever drawn between them. Then if so, this claim, when recovered, fulfils almost to the letter the definition of assets which I have cited from the Touchstone. It was said in the argument, that costs in equity differ materially from costs at law, being, as it is called, in the discretion of the Court. And so in one sense they are—that is to say, they do not follow the decision of the cause as at law, and are not governed by any such general rule. But in no other sense are they in the discretion of the Court. They form the subject of a distinct adjudication, depending on the particular circumstances of each case, applied to certain rules. But they are of right, according to the proper application of those rules. This is fully discussed by Lord *Eldon* in the case of *Vancouver v. Bliss* (a). In this case, therefore, the claim of the estate to be indemnified from the liability incurred by it in the lifetime of the testatrix, was equally a right of action at the time of her death, whether such claim were to be enforced at law or in equity, although the principles on which such claim would be allowed might differ in the two courts. Nor do I think that the circumstance, that the costs are directed to be paid to Mr. Johnson, can make any difference, except as to the costs due to him. That portion of the sum awarded, although in the nature of assets, so far as regards the amount due to him from the testatrix, is not assets which have come to the hands of the defendant; for by the decree the defendant never had the right to receive them. But as the decree is wholly silent both as to Mr. Smedley and Mr. Jones, the defendant, and the defendant alone, as I think, had the right to demand the surplus from Johnson. The

Smith of Rivers,
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&
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(a) 1 Ves. jun. 462.

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decree is that the defendant's costs shall be paid to Mr. Johnson. This only gives Johnson a limited lien for his own costs--no more; as to all the surplus, it is the defendant's, and to be paid to him. And so the parties have acted; for it has been disposed of by Johnson according to the defendant's directions. It is said that inconvenient results will follow from holding this to be assets, liable to the general distribution according to the rules of law, and that this money, intended by the Chancellor for Mr. Smedley and Mr. Jones, will be intercepted in that case by creditors of the estate of higher degree. If the estate be insolvent, it will be so; but in that case these gentlemen had only to apply to the Lord Chancellor, who would have saved, in his decree, their lien by a special direction. To treat Johnson as the trustee for the other two solicitors will involve the case in great difficulties. In the first place, he will lose his own lien in part, or else be trustee for the surplus only. Now surely the Chancellor could not mean, in making him trustee, to give him a preference over the other solicitors. Secondly, if trustee, he must be trustee for the estate as to the surplus, in case the other solicitors have been previously paid, either wholly or in part, and then he cannot safely pay over the residue to the other solicitors without taking the account between them and the estate. How is he to do that? Is it reasonable to suppose that the Chancellor meant this decree to be the foundation for other two suits in equity? Or, if this be money had and received to the use of the other solicitors, how much is so received? It is impossible not to see that these apparently inconvenient consequences must follow if we should depart from the plain words of the decree, and if we do not hold it to mean an award of a given sum of money to the defendant for his costs, as the representative of Jane Carter, but to be paid to Johnson in order that Johnson might retain thereout the amount of his own bill, and pay over the

balance to the defendant himself, as an indemnity to the estate for the liabilities incurred in the suit with the other two solicitors. If so, then this surplus is assets in his hands.

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But then there is another question, whether the whole of the surplus be assets which fall within this agreement. And as to that, I think that only the portion received by Johnson *subsequently* to the agreement is within the terms of the agreement; that amount was 84*l.* 8*s.* 8*d.*; and to this extent I think the defendant was responsible. And it is satisfactory to me to find that this view of the law meets the exact justice of this case; for if Smedley had proceeded in his original suit, he would, as a judgment creditor, have obtained a preference, and the agreement of the defendant only gives him the same advantage. If the defendant, in so agreeing, has placed himself in a disadvantageous situation as to other creditors, it is his own fault for not letting the law take its course in the case of an insolvent estate. I think, therefore, that there should be a new trial.

PARKER, B.—In this case the plaintiff had a claim on Jane Carter, the defendant's testatrix, for a bill of costs of 817*l.* odd, and having brought an action thereon against the defendant, which was at issue and stood for trial, an agreement was entered into between the plaintiff and the defendant, by which, in consideration of the plaintiff's withdrawing the record, the defendant promised to pay 100*l.* in part, and the residue whenever assets of Jane Carter should come into his hands. This agreement was the subject of the present action, and the pleadings raised the single question, whether, after the making of that agreement, any such assets had come to the hands of the defendant. On the trial, my Lord Chief Baron was of opinion that there was no proof of that fact, and therefore directed a nonsuit.

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Upon the argument, on a rule nisi for a new trial, the only question was, whether a sum of 615*l.* 11*s.* 8*d.*, paid by order of the Court of Chancery to Mr. Johnson, the solicitor of the defendant, or any part of it, was assets. It seems to me that a part of that sum was assets.

In order to understand the question, it is not necessary to give more than a short outline of the Chancery suit. It was instituted originally by Jane Carter, against the executors and legatees of annuities under the will of her father, for the purpose, amongst other things, of having her rights, and those of the other legatees, declared, and for an account of the testator's estate. The suit was afterwards revived against the representatives of some of the defendants, and by the now defendant, as executor of the plaintiff, some of the defendants and the plaintiffs having died during the progress of the suit; and in 1833 a decretal order was pronounced by the Master of the Rolls, declaring the rights of the parties, and ordering that the Master should settle the costs, charges, and expenses of all the parties, and that the same, when taxed and settled, should be paid out of the fund in Court, in the following manner: the plaintiff's costs, to Mr. Johnson, his solicitor, and the costs of the different defendants to their respective solicitors, (naming them), and if the fund was insufficient, the balance was to be paid by the receiver of the estates to the different solicitors, in proportions to be settled by the Master. And it was also declared, that the costs ought to be borne by the several persons interested in the annuities bequeathed by the testator's will, and the residuary estate of the testator, and the personal representatives of such of the persons so interested as were dead, rateably, and in proportion to the amounts of their several annuities and shares of the residue; so that the parties contribute to the fund in different proportions than those of the expenses actually incurred by them respectively in the suit. Many other directions were given, immaterial to the present purpose.

The Master taxed the costs of the plaintiff in equity, the now defendant, at 678*l.* 3*s.* 6*d.*, pursuant to this order, and afterwards there was paid to Mr. Johnson for those costs, out of the fund in court, 485*l.* 3*s.* 11*d.*, and by the receiver, at a subsequent date, 135*l.* 5*s.* 8*d.*, and after the date of the agreement, 84*l.* 8*s.* 8*d.* The bill of costs so taxed was made up of the costs of Jane Carter in her lifetime, who employed, first, Mr. Jones, and afterwards the plaintiff, as her solicitors; and of the now defendant's costs as executor, who had employed Mr. Johnson. The question is, whether any part of that sum, so received, was assets received by the defendant.

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For the purpose of having a clear understanding of this question, it is necessary to bear in mind what the relative situation of solicitor or attorney and party is, as to costs. The party employs the solicitor, whose remedy for the bill of costs is against his employer, by an action for his work, labour, and skill, which lies equally, if the solicitor has done his duty, whatsoever the event of the suit be. He has a lien upon, but no interest in, the costs recovered. These costs, which are payable from the adverse side, are only by way of an indemnity to the party for the costs incurred by him, and the receipt of them by the party in no way affects the right of action of the attorney or solicitor, who could not sue his client for money had and received. It is wholly immaterial to the right of action of the solicitor against the client, whether the client has received costs from the adverse side or not, and wholly immaterial to the right of the party to recover his costs from his antagonist, whether the party have paid them to his solicitor or not. Upon these points I apprehend there is no doubt.

If, therefore, a person recover a judgment at law for his debt and costs, both become a duty payable to him; and if he die, both are payable to his executor, and are assets when received by him; but if the attorney em-

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ployed by the deceased is unpaid, he retains a lien on the judgment for his unpaid costs. If the testator recover a judgment for debt and costs, and his executor sue out a sci. fa. upon that judgment, the debt and costs due to the testator are assets when received: the sum due for costs to the executor, is only by way of indemnity to himself, and is not assets. Upon this part of the case, also, I conceive that no doubt exists.

But, not only are debts or duties, to which a deceased had a right of action, and which come to the executor's hands, assets, but also such things as come to the executor by reason of his executorship, although they were never vested in right or possession in the testator.

Therefore, although the testatrix had no decree for costs in this case, the amount decreed to be paid out of the fund to the executor, in that character, by way of indemnity for the costs incurred by the testatrix and himself (for such is the real nature of the transaction) would, so far as related to the costs of the testatrix, be assets when received by the executor, and if the decree had directed the amount of the testatrix's costs to be paid to the executor, and they had been paid to the defendant, there would, I conceive, have been no doubt but that they would have been assets.

The doubt which has arisen, is created entirely by the language of the decretal order, which directs the plaintiff's costs to be paid to *Mr. Johnson*, his solicitor: and it is contended that this has the effect of making him a trustee for both the solicitors employed by the testatrix, and therefore the receipt by him is no receipt by Mr. Philpot, the defendant. But I cannot see any proof of such intention in any part of this decretal order. *Primâ facie*, where a plaintiff's costs, or any other sum due to him, is ordered to be paid out of a fund in Court to his solicitor, I should say the only reason is, because the solicitor is the person *who represents* the litigant party for *all purposes* before the Court, and is the person to whom

the actual payment by the Court would be made; and the only consequence of such an order is, that if the solicitor be unpaid for the costs of the cause, or have any other demand on his client, he has a more effectual mode of securing his lien, for he may retain the amount of such costs or demand out of the money received by him. There is nothing in this case to shew that more was intended than a payment of a part of the fund in Court to the solicitor, as representing the party. The solicitors employed by the testatrix were not before the Court; they have not applied to have any part of the amount to be taxed for costs, secured or appropriated for their use, on the ground that they could not obtain from their own client, or her representatives, the amount due to them for their labour and skill in conducting the suit in an earlier stage. If they had, the Court would have dealt with the application as it thought equitable; but it seems to me to be a very forced construction of such an order as this, to say, that the Court meant to protect the interest of persons who had never sought protection, and who, it may be presumed, never wanted it; for, as they had ceased to be the solicitors employed, they would, *prima facie*, be taken to have been either paid or satisfied by their own client the amount of their demand, or to have been content to look to the personal responsibility of that client for it.

The conclusion, therefore, to which I come is, that all the money received by Johnson, over and above what paid the amount of his own bill, was received on account of the executor, and was equivalent to a receipt by *him* in point of law: and for that amount the defendant would have been responsible as executor in an ordinary action, and liable in this action, on his special agreement, for whatever Johnson received over and above the amount for which he had a lien, after the date of the agreement on which the action was brought: for he is bound by that agreement to apply all future assets received by him *to the payment of*

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the plaintiff's demand only. But without doubt, any part which Johnson paid over to the defendant Philpot, either actually or constructively, by payment on account, (and of this, from my lord's note, there is evidence for the consideration of the jury,) would be assets.

If it should appear that Johnson had agreed with the plaintiff Smedley or Jones, in such a way as to preserve their respective liens on the papers, given by the act of the testatrix, in the same manner as if they had continued to have them up to the time of the receipt of the money, (supposing this could have been done), then, indeed, the amount for which such liens existed would be a charge on the fund, created by the act of the testatrix herself, and the balance only (if any) after satisfying such liens, would be assets. But it is enough to say, for the present, that no such agreement was made out in point of evidence. I think, therefore, that the rule should be absolute for a new trial.

Lord ABINGER, C. B.—The declaration was upon a special contract, bearing date the 12th December, 1834, whereby, in consideration of the plaintiff withdrawing a record in an action then pending against the defendant, as executor of Jane Carter, the defendant undertook to pay 100*l.* then, and to pay the further demand which the plaintiff had against Jane Carter, deceased, out of the first assets of Jane Carter which should come to his hands. It then averred that assets had come to his hands, and assigned a breach of non-payment. The defendant pleaded that no assets had come to his hands since the agreement, upon which issue was joined. There was also a plea of non-assumpsit, on which the plaintiff proved the contract as alleged, which was made and dated 12th December, 1834. It appeared that Jane Carter, to whom the defendant was executor, had filed a bill in equity 27 years ago for taking the account and distributing the estate of a deceased person, in

which she had an interest as one of the next of kin among whom the estate of the testator was to be divided, after the payment of various incumbrances. The plaintiff had been employed as her solicitor during part of the proceedings, but, for some reason which did not appear, had given up the suit, which had been transferred to another solicitor, Mr. Johnson, in her lifetime, who conducted it to the period of the decree in 1833. The plaintiff's bill had not been paid when he transferred the papers to Mr. Johnson. Jane Carter died in prison a few months after Mr. Johnson became her solicitor, leaving no property or claim to any property, except that which might be expected upon the result of the suit in equity, in case there should be any surplus of the testator's estate to be divided. The defendant Philpot, as her executor, filed a bill of revivor to continue the suit, which was conducted for him also by Johnson. A final decree was made in the suit some time in 1833, by which certain sums of money were ordered to be paid into the Bank to the account of the Accountant-General, as part of the testator's estate; a receiver who had been before appointed was to continue to receive certain annuities and leasehold rents, part of the estate, and a certain leasehold interest was to be sold. It appeared by the recitals that the estate was liable to various incumbrances, which need not be specified, which were all to be satisfied before any surplus could be divisible amongst the next of kin. It appeared also, that one of the parties to the suit, who was directed to pay money into the bank, had also employed Mr. Smedley, the plaintiff, as his solicitor, and had paid his bill of costs, amounting to about 18*l*. The decree therefore directed that this party should deduct from the amount he was to bring in, the bill of costs so paid. The decree then directed that the Master should tax the costs of all the parties, and that out of the fund in court, if sufficient, the Accountant-General should pay to Mr. Johnson, the plaintiff's soli-

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citor, the plaintiff's costs, and to the other solicitors respectively their costs; and if the fund in Court were not sufficient for that purpose, then the receiver was ordered to supply the deficiency out of any funds which he might thereafter receive, or it was to be supplied out of any further funds that might arise from the testator's estate, when sold and brought into court; and after payment of these costs, the decree directed that the Accountant-General should pay the incumbrances, debts, and legacies out of the same funds, as far as they would go, and in case, after payment of all these charges, any surplus should remain, the same was to be divided into two portions, one of which was to be paid to the defendant Philpot, the plaintiff in that suit, as the personal representative of the original plaintiff, Jane Carter, who was entitled to the same as one of the next of kin.

It appeared in evidence that the bill of costs of Mr. Jones, the first solicitor employed by Jane Carter in that suit, and the bill of costs of the plaintiff, Mr. Smedley, had been placed before the Master by Mr. Johnson, the then solicitor, along with his own bills, and the whole together had been taxed at the sum of 678*l*: and that the fund in court, with the addition of certain sums since paid by the receiver, was not sufficient to satisfy all the claims of different parties to the suit for costs. It was clear, however, that if all the taxed bills were reduced rateably, a certain amount, it was said 186*l*., would be ascribed to the bill of the plaintiff. Mr. Johnson, the solicitor, received the rateable portion due upon taxation of the bills presented by him, and some further payments from the receiver, and would have paid the plaintiff Smedley his portion, had not the defendant, as he alleged, prevented him, by stating that Smedley had an action pending against him. He had therefore paid, by the plaintiff's desire, to another solicitor of the name of Jones, who had preceded Mr. Smedley in the suit, the surplus of what satisfied his

own bill out of the monies he received from the Accountant-General, and, as he said, had accounted to the defendant for the payments since made by the receiver. Whether, by accounting to him, he meant that he had paid the money to him, or paid it to others by his order, did not appear; but it appeared that since the date of the agreement, 12th of December, 1834, Johnson had received two sums from the receiver, amounting to 84*l.* 8*s.* 8*d.*

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Upon this state of facts, the plaintiff's counsel contended that such portion of the funds which Mr. Johnson had received for costs under the decree, as was the rateable portion of the taxed costs of the plaintiff, were assets of Jane Carter, and were in the hands of the defendant, because the receipt of his attorney was his receipt. I thought that, under the circumstances of this case, Mr. Johnson received this money on behalf of the plaintiff Mr. Smedley, and not on behalf of the defendant; and that being no part of the testator Jane Carter's estate, nor a sum to which she had any claim or title, it was not assets in her executor's hands; and directed a nonsuit, to set aside which this rule has been granted.

It is very true, that the plaintiff is fairly entitled to have the benefit of that portion of the taxed costs which is ascribable to his bill; but the question whether that sum was assets of the testatrix in the hands of the defendant, is not to be tried by that criterion; but it is to be decided in the same manner, and upon the same principles, as if any other creditor of the testatrix had brought an action against him as executor, and, upon a plea of no assets, had given these facts in evidence to prove assets. If, for example, a creditor on a bond had brought an action against the defendant as executor; if this sum be not assets, such bond creditor, upon a plea of no assets, would not have been entitled to a verdict; but if this sum be assets in the executor's hands, then he would be entitled to a verdict, even though Mr. Johnson, the solicitor, had

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paid the whole sum to Mr. Smedley, as he ought to have done. The executor could neither protect himself by a plea of no assets, nor by a plea of *plene administravit*, as he could not justify the payment to Smedley, a creditor by simple contract, whilst the bond remained unsatisfied.

It has been contended, that the decree in this case, directing costs to be paid to the plaintiff's solicitor, is like a judgment at law, which includes the costs as part of the debt recovered, though the plaintiff may not have paid the costs taxed to his attorney. In that case, it cannot be denied that all the money due upon the judgment is a debt due to the plaintiff; nor, if he dies, that his personal representative alone could have a *scire facias* upon the judgment; nor that the sum received by him upon that judgment, including the unpaid costs of the attorney, would be assets of the deceased in his hands. And it has been said, though the testatrix did not pay the costs, yet, by the decree of the court, she or her executor became entitled to receive them, as if she had paid them.

Now, if this had been a decree in favour of the testatrix, with costs to be paid by the defendants in equity to her executor, as between party and party, there might be some analogy to the case of a judgment at law; but this is the case of a suit to administer the estate of a person deceased, in which there are, properly speaking, no hostile parties. In such a suit, the Court first make a decree that the personal representatives of the deceased shall come to an account before the Master. Upon the Master's report, or upon the answer, if the funds are admitted, the Court orders the funds in hand to be brought into Court, and when all proper parties are before the Court, and all claims are duly investigated and ascertained, a final decree is made for the distribution of the funds. It is most usual in such cases to direct that the costs of all parties shall be taxed as between attorney and client, and paid out of the corpus or fund in Court, or within the control of the Court, but

it is by no means necessary, or a matter of duty, that the Court should do so. Costs of all kinds are in the discretion of a court of equity. No party has any right or interest in them till the order of the court is pronounced, and then the costs are to be paid only to a person designated to receive them by the order or decree. The Accountant-General can pay them to no other person. If they are ordered to be paid to the plaintiff's solicitor, he cannot pay them to the plaintiff; and vice versâ, if to the plaintiff, he cannot pay them to the solicitor. Moreover, the Court will permit any solicitor in the suit or party, on motion or by petition, to suggest the interest he may have in any order or decree the Court may be disposed to make regarding costs. For example, in a long pending suit, where there have been several solicitors, or several successive parties, the Court will hear applications, from the solicitors, or from the representatives of deceased parties, for the purpose of modifying the decree for costs, so as to prevent their falling into hands not entitled to them. If a solicitor has given up the suit without receiving his costs, and does not choose to trust his successor, the Court will allow him, on petition, to intervene, so as to make the costs due to him payable to him only, and not to the party or his present solicitor. Or, if the bill of that solicitor has been paid by the existing party, or by a deceased party, whose personal representative he is, the Court will, upon a proper suggestion, direct *that* portion of the costs to be paid to the party himself, whilst the remainder are paid to his solicitor.

In the case now in question, it is clear that Mr. Smedley delivered up the papers in the suit to Mr. Johnson, without payment of his bill by Jane Carter; but instead of intervening before the final decree, by a petition that the costs, if any should be allowed, might pro tanto be paid to him, his bill was laid by Mr. Johnson before the Master, as well as Mr. Jones's, the first solicitor, to be

Each. of Pleas,
1858.

SMEDLEY
v.
PHILPOT.

Exch. of Pleas,
1838.

SMEDLEY

v.

PHILPOT.

taxed, together with his own, as the costs, not of the plaintiff Mr. Philpot, but of all the plaintiffs from first to last in the suit; and the decree directed that, when taxed, they should be paid, not to the plaintiff in equity, but to Mr. Johnson. A Court of equity, in suits of this nature, when it thinks proper to direct the costs out of the fund in court, is especially careful of the interest of the solicitor, and will therefore always direct the costs to be paid to him, unless upon some special application it should appear that he has been already paid, in which case the costs so paid to him are directed to be repaid out of the fund to the party. This very decree furnishes an example of that nature, where one of the accounting parties having paid 18*l.* to Mr. Smedley, upon some incidental proceeding, is directed to deduct that sum from the money he is to bring into court.

The question then is, in what capacity did Mr. Johnson receive that part of the costs which were taxed in respect of the plaintiff Smedley's bill? That he did not receive it as his own is quite clear—that he made use of the materials and documents of Mr. Smedley to obtain it is quite clear—and it is equally clear that he used those materials and documents for that purpose by Mr. Smedley's authority.

It appears to me, therefore, that he received the money to the use of Mr. Smedley, without whose authority, expressed or implied, he could not have received it at all. The fallacy of the argument on the other side appears to turn upon the supposition that *Jane Carter, the deceased, had in her lifetime some sort of interest* in these costs, because she was indebted to her attorney in respect of them, and that this interest became vested in the plaintiff as her personal representative. But she had no such interest—she had no inchoate right to costs out of the fund in Court: it was purely in the judge's discretion whether the costs incurred by her should be paid out of that fund or not paid at all; or even whether the costs of other par-

ties should not be paid by her, or out of her assets, if she had any. It could not, therefore, be said, till the Chancellor pronounced his decree, that any person had a right to receive those costs, or an inchoate interest in them. As Jane Carter had no such right or interest, none such could vest in her personal representative. If she had actually paid Mr. Smedley's bill in her lifetime, or if her executor had paid it out of her assets, he might have received the amount, at the discretion of the Chancellor, to replace that part of her estate, by an order to have them paid to himself, or, if he permitted the order to be so made, to pay them to his solicitor. Mr. Johnson would, in that case, have received them to his use as executor, and been liable to account to him for them. Then, indeed, the amount of those costs, when paid either to the executor or his solicitor, would have been assets of Jane Carter in his hands; not upon the ground that they were a debt due to her, or that she had left to him any claim or interest which she had in them, but because it pleased the Chancellor to order that the portion of her estate which had been so expended, should be replaced out of the funds to her executor. But as neither he nor Jane Carter had ever paid these costs, Mr. Johnson, who alone could receive them from the Accountant-General under the decree, held them for the person who was entitled to them, and that person was Mr. Smedley, for whose use the Chancellor intended them to be paid. Perhaps the best mode of illustrating this argument is, to suppose that the facts as they here appear had been brought by a petition from the defendant Philpot before the Chancellor, stating that part of the costs of the plaintiff in the suit consisted of a bill still due to Mr. Smedley, a former solicitor in the suit, and praying that this bill should, when taxed, be paid, to enable him to satisfy Mr. Smedley. What, in that case, would the Chancellor have done? He must either have made the order to pay the amount of

Exch. of Pleas,
1836.

SMEDLEY
v.
PHILPOT.

Exch. of Pleas,
1838.

SMEDLEY
v.
PHILPOT,

that bill to Mr. Smedley, or to pay it to the plaintiff, that he might therewith discharge Smedley's bill—that is, to the use of Smedley. There would have been an appropriation of the sum by the very terms of the order which directed it to be paid. In that case, would this sum have been assets of Jane Carter, or would the executor have been bound to pay a bond creditor of hers in preference to Mr. Smedley? The case, though different in form, is substantially the same. The very object and design of the decree, that the costs shall be paid to the plaintiff's solicitor, in the suit in equity, is, that those costs, before they come to the hands of the party, shall be appropriated to the discharge of all the unsatisfied bills which have been taxed. It is the pleasure of the Chancellor that all the costs shall be paid out of the fund before it is divided, and it is also his pleasure to direct that for that purpose the amount of the taxed costs shall be paid to the solicitor. The solicitor, therefore, receives it, not as part of the debt due to his client, or as a claim in which his client, *not having paid any costs*, has any interest, but for the purpose of satisfying all the costs which have not been paid, and exonerating his client therefrom.

Let me suppose that Mr. Johnson had, with or without the consent of the defendant, paid to Mr. Smedley the portion of the costs due in respect of his claim, and that afterwards a bill in equity should be filed by a creditor to take the accounts and administer the estate of Jane Carter, and that she had specialty as well as simple contract creditors. I desire to ask whether the Chancellor would charge the executor with this payment, as a misapplication of the testator's estate to satisfy a simple contract creditor, before the debts on specialty were discharged? It appears to me that it would be quite impossible he should do so, and that in answer to an application for that purpose, he could not say otherwise than that, Jane Carter never having paid these costs, the decree was not made for the pur-

pose of discharging any debt due to her, for none was due; nor to replace any sum which she had expended in costs; for she had expended nothing, but substantially, if not specifically, to be applied in the payment of the bills of the solicitors, from first to last, which had not been paid. Again, suppose that Philpot, having no assets of Jane Carter, had paid Mr. Smedley's bill with his own money, can it be doubted that he would have had a right in that case to repay himself out of the sum received by Johnson for these costs? and yet if that sum could be considered assets in his hands, it is clear that as against a specialty creditor of Jane Carter, he could not have discharged himself, because Smedley was a creditor by simple contract only, and if an executor pays with his own money a creditor by simple contract, though he shall be allowed this, and repay himself out of the assets, as against creditors of the same degree, yet he cannot apply the assets, when he receives them, in that manner, as against a creditor by specialty. Again, the payment or accounting by Mr. Johnson to Mr. Philpot, appears to me to make no difference in the case. If Mr. Philpot had commenced an action against Johnson for this money, it appears to me that Johnson might have defended himself by shewing the facts, that he had received the money on account of a bill of Smedley, which had never been paid, and that he was accountable to him for it; and if Johnson might have made such a defence, the voluntary payment made to the defendant does not exonerate him from Mr. Smedley's claim.

Upon these grounds, I retain my opinion that a nonsuit was right; not because the money ought not to have been paid to Mr. Smedley, but because I think it was in effect appropriated by the order, and the circumstances of the case, to him, and did not therefore form any part of Jane Carter's assets.

Rule absolute for a new trial.

Exch. of Pleas,
1838.

SMEDLEY
v.
PHILPOT.

Exch. of Pleas,
1838.

HAIGH v. JACKSON.

Where, a sum of money being due from A. to B., C., by B.'s request, and for his accommodation, drew a bill of exchange on A. for the amount, which A. accepted, and C. then indorsed the bill and gave it to B., who indorsed and negotiated it;—B. having subsequently become bankrupt, *Held*, that the amount of the bill, which was dishonoured, and paid by C., was proveable by him under the fiat, and therefore that his right of action against B. was barred by the certificate.

PETERSDORFF moved for a rule to shew cause why the bail-bond given by the defendant in this cause should not be set aside, on the ground that he had become bankrupt and obtained his certificate. It appeared from the affidavits, that the action was brought to recover the amount of a bill of exchange paid by the plaintiff, under the following circumstances. The defendant having a sum of money owing to him by a third party, the plaintiff, at the defendant's request, and for his accommodation, drew a bill of exchange on that party for the amount, which the latter accepted; the plaintiff indorsed the bill and handed it over to the defendant, who also indorsed and negotiated it. Before it became due the defendant had become bankrupt, and the bill, being dishonoured, was taken up by the plaintiff.

Barstow shewed cause in the first instance.—The question is, whether this be a debt proveable against the defendant under the fiat. Now, there is clearly no contract between the plaintiff and the defendant *on the bill itself*, the plaintiff being the drawer and indorser, and the defendant a subsequent indorser. They appear to stand only in the situation of co-sureties for the acceptor. *Yallop v. Ebers* (a) was a similar case. There the defendant undertook, on certain considerations, to pay the balance due on a bill of which the plaintiff was the acceptor; and afterwards engaged to deliver up the acceptance to the plaintiff within a month, or to indemnify him against it. The defendant became bankrupt, and did not pay or give any indemnity, and the plaintiff was obliged to take up the bill. It was held, in an action for a breach of this contract, that the plaintiff could not have proved under the commission,

(a) 1 B. & Ad. 698.

either for a debt not payable at the time of the bankruptcy, or for a contingent debt, or in the character of a surety. [Lord *Abinger*, C. B.—Here, as between the parties, the bankrupt was the principal, and the plaintiff, who lent him his name, a surety for him.] In *Clements v. Langley (a)*, the defendant, who was one of five co-obligors in a bond for the due payment of principal and interest for money borrowed by C., became bankrupt after a forfeiture had accrued by non-payment of interest, which, however, was subsequently paid. C. afterwards made default in payment of the principal, and payment was enforced from the four solvent co-obligors. It was held that they could not prove against the plaintiff under the commission, for contribution. [Lord *Abinger*, C. B.—There they were not sureties for him; the question arose among co-sureties for another party.] So here, the plaintiff and the defendant, it is submitted, were only co-sureties to the holder of the bill for the acceptor.

Exch. of Pleas,
1838.

HAIGH
v.
JACKSON.

LORD ABINGER, C. B.—The plaintiff was surety for the bankrupt; all you can say is, that he was also surety for the acceptor.

PARKE, B.—It certainly strikes me that the plaintiff is surety for the debt of the bankrupt, contracted by his obtaining credit on the bill so indorsed by the plaintiff. It being an existing bill, the agreement is, that the plaintiff shall indorse it, in order that the defendant may obtain an advance of money on it. The plaintiff, certainly, is not an immediate surety, but only on the default of the acceptor.

The rest of the Court concurred.

Rule absolute, without costs.

(a) 5 B. & Ad. 373.

Esch. of Pleas,
1838.

SPARROW *v.* JOHNS.

An attorney need not deliver a signed bill for disbursements by him as attorney in a cause in respect of which he does not intend to make any charge to his client.

Quære, whether a sum of money paid by an attorney on taking out a rule to discontinue, is a taxable item?

A RULE had been obtained, calling upon Mr. Armstrong, the plaintiff's late attorney in this cause, to shew cause why he should not deliver to the plaintiff, or her husband, a true bill, subscribed with his hand and name, of all fees, charges, and disbursements in all matters in which he had been concerned as attorney for the plaintiff, and why he should not give credit for all sums received by him.—It appeared from the affidavits on both sides, that Mr. Armstrong was the brother of the plaintiff, and had acted for her in divers matters of business during the last four years, and amongst others, had conducted this cause as her attorney. Mr. Armstrong swore that he had acted for her throughout the suit without fee or reward, and that he had no intention of making any charge in respect of his costs. It appeared however, that he had rendered her an account current, in which was an item of 15*l.* 5*s.* for costs paid on taking out a rule to discontinue in the above cause. Differences having since arisen between the parties, Mr. Armstrong had delivered a bill, in which this item of 15*l.* 5*s.* was not included.

Kelly, (*Butt* with him), shewed cause.—The present application is made, some family quarrels having arisen, only for the purpose of introducing a taxable item into the bill called for, so that the whole account may be subjected to taxation. But inasmuch as the attorney distinctly swears that he conducted the cause gratuitously, and that he intends to make no charge in respect of it, the statute does not apply. The delivery of a bill can only be requisite where the attorney makes a claim for his costs.—The Court called on

Platt and *Hindmarch*, *contrà*.—The item of 15*l.* 5*s.* was clearly a disbursement made by the attorney in the course

of the conduct of the cause by him as attorney, and therefore was a taxable item. And the stat. 3 Jac. 1, c. 7 makes it imperative on the attorney to deliver his whole bill. [Alderson, B.—I think it hardly means that he should deliver a bill when he does not mean to demand it.] He does not say that he did not originally intend to make a claim in respect of this sum, and he admits that he has omitted it for the purpose of preventing a taxation. The taking out a rule to discontinue on payment of costs is clearly the act of an attorney as such: it is an act whereby he prevents the further consequences of the prosecution of the suit to his client. The moment you introduce the judgment of the attorney as protective of the client's interest, the money disbursed thereupon becomes a taxable item. *Latham v. Hyde* (a), *Hill v. Humphreys* (b), *Miller v. Towers* (c). [Alderson, B.—In *Prothero v. Thomas* (d), Gibbs, C. J., puts the case on the ground that, in order to compel the delivery of a signed bill, there must either have been a disbursement in a cause which the attorney is managing for the client, or he must be suing to recover a compensation for his skill and labour]. The present case falls within the first branch of that proposition. It matters not whether the act be done in furtherance or in prevention of the suit. But, further, the attorney had no right to exclude this item, in order to prevent the bill from being subject to taxation. [Parke, B.—He has no more to put in than he has done, because he does not mean to make a charge in respect of the suit.] In *Crowder v. Shep* (e), money paid by the attorney for the client, for costs, was held to be a disbursement within the statute.

PARKE, B.—Whatever question there might have been whether this was a taxable item, where the relation of attorney who was to be paid and client subsisted,—on

(a) 1 C. & M. 129.

(d) 6 Taunt. 196.

(b) 2 Bos. & P. 343.

(e) 1 Campb. 437.

(c) Peake's N. P. C. 138.

Arch. of Pleas,
1838.

SPARROW
v.
JOHNS.

Exch. of Pleas,
1838.

SPARROW
v.
JOHNS.

which I have considerable doubt,—I think the statute does not apply to this case, where the attorney does not mean to act as an attorney for fee or reward, and therefore that his bill was not taxable. The rule will therefore be discharged, Mr. Armstrong undertaking not to bring any action for his fees.

The rest of the Court concurred.

Rule discharged.

MORTIMER v. PREEDY.

A writ of trial was directed to be tried in the Sheriff's Court, London, under 3 & 4 Will. 4, c. 42, s. 17, returnable on the 19th of January. A court was holden on the 18th, which was adjourned to the 20th, on which day the cause was tried:—*Semble*, that this was a mis-trial, and that application ought to have been made to a Judge to have the time extended.

Semble, that debt for use and occupation, on a parol demise, by the assignee of the reversion against the lessee, cannot be maintained for the occupation which took place before the assignment of the reversion.

DEBT for use and occupation, upon a parol demise, by the assignee of the reversion against the lessee. Pleas, first, *nunquam indebitatus*; secondly, that the tenancy was determined by act and operation of law, before the plaintiff had any interest in the premises, and before any rent was due to him; on which issue was taken. The plaintiff, in his particulars, claimed the sum of 6*l.* 5*s.* for one quarter's rent ending at Michaelmas day, 1837. The cause was tried before *Arabin*, Serjt., at the Sheriff's Court in London, by an order made under the 3 & 4 Will. 4, c. 42. It was then objected that there was a mis-trial, inasmuch as the writ of trial was returnable on the 19th of January, but the cause was not tried until the 20th, having been adjourned from the 18th. It appeared in evidence, also, that the premises in respect of which the rent was claimed were situate in the county of Middlesex, whereupon it was objected that the action was local, and could only be tried in that county. The jury, under the direction of the learned Judge, found a verdict for the plaintiff for the amount claimed, leave being given to the defendant's counsel to move to enter a nonsuit, on the grounds of objection above stated.

Mansel having on a former day obtained a rule to shew cause why a venire de novo should not be awarded into the county of Middlesex, and why the plaintiff should not pay the costs of the application,

Esch. of Pleas,
1838.

MORTIMER
v.
FREEDY.

Gurney shewed cause.—In *Sherman v. Tinsley* (a), where a cause (which had been made a remanet,) was tried before the sheriff on a day subsequent to the return day of the writ of trial, the Court said they would amend the record. There the objection appeared on the record. In this case no amendment is required, as the record is correct, and states that the trial was had on the 18th, (from which day the cause was adjourned to the 20th.) This is the proper mode of entry when the Court is adjourned from a former day; for the sittings are but one day in law. That was decided in *Jacobs v. Miniconi* (b), where the Court said that all the verdicts given referred to the first day. The same point was decided with respect to the assizes, in an anonymous case, 1 Salk. 8. He also cited *Taylor v. Harris* (c).—It is the same as if the cause had been tried on the 18th, or as if it had been commenced on the 18th, and for want of sufficient time to finish it, had been adjourned to the 20th.

But secondly, it is said that the action was local, and that the cause ought to have been tried in Middlesex; and *Bond v. Cudmore* (d) is relied upon. But that was a perfectly different case; that was the old action of debt for rent on a lease, which depended on the privity of estate, and the right of action would arise only from the possession of the land. The action was therefore held to be local, because the privity of contract was gone by the assignment of the reversion and the attornment, and the rent followed the land. But even though a local action be brought and tried in a wrong county, the defect is cured

(a) 4 Scott, 286.

(b) 7 T. R. 31.

(c) 3 Bos. & P. 549.

(d) Cro. Car. 183.

Rech. of Pleas,
1838.

MORTIMER
v.
PARSONS.

by verdict, by the stat. 16 & 17 Car. 2, c. 8; *Mayor of London v. Cole* (a). [*Parke, B.*—There is some difficulty in recovering for use and occupation in this case. How can an implied contract be transferred—a contract implied from the occupation?] It was held in *Lumley v. Hodgson* (b), that since the stat. 4 Anne, c. 16, s. 9, the action for use and occupation may be brought by the assignee of the reversion, without attornment of the tenant. In *King v. Fraser* (c), it was held that debt lies for use and occupation generally, without stating where the premises lie, or any of the particulars of the demise. So, in *Kirtland v. Pounsett* (d), and *Egler v. Marsden* (e), the one assumpsit and the other debt, it was held that the action for use and occupation is not a local action. [*Alderson, B.*—Another doubt is, whether the second objection can be taken advantage of on these pleadings. The defendant has not pleaded that the premises were situate in another county.]

Mansel, in support of the rule.—The jurisdiction of the judge of the sheriff's court in this case arose out of the stat. 3 & 4 Will. 4, c. 42, s. 17. His authority is defined by that statute, and he is to return the writ with the finding of the jury indorsed thereon, at a day certain in term or in vacation, to be named in such writ. This is precisely analogous to the case of mesne process, where the sheriff can do nothing upon the writ after it is returnable. The return states that the cause was tried on the 18th, but that is not according to the fact, and the mis-trial is not cured by stating that on the record. That cannot make it a proceeding nunc pro tunc. This differs from the case of the death of the defendant between the commission day and the day of trial, as the assizes are considered as but one day; but

(a) 7 T. R. 583.

(b) 16 East, 99.

(c) 6 East, 347.

(d) 1 Taunt. 570.

(e) 5 Taunt. 28.

here all the authority is derived from and limited by the writ of trial. On the 19th, the jurisdiction of the judge of the Sheriff's Court was at an end; and even if the trial had been commenced in due time, he had no authority to order an adjournment beyond the day stated in the writ. The plaintiff ought to have got the return day altered, and the writ resealed. A witness could not be indicted for perjury when a trial had been had under the circumstances of this case.

Exch. of Pleas,
1838,
MORRISON
v.
PARKER,

PARKE, B.—The defendant had better pay the money, and the parties consent to a stet processus. If the trial of the cause has not commenced before the writ is returnable, the proper course seems to be to apply to a judge to have the time extended. There may also be considerable difficulty in recovering the whole of the rent claimed. The plaintiff is seeking to recover for the use and occupation of the premises for a by-gone time, and before he had the reversion. The proper remedy seems to be an action of debt for rent on a parol demise.

ALDERSON, B.—The parties had better consent to this arrangement, as there are difficulties about the trial taking place after the writ was returnable.

Rule discharged on the above terms.

REGINA v. SHERIFF OF CHESHIRE, in GOACH v. ATKINSON.

ON shewing cause against a rule nisi for setting aside an attachment against the sheriff on payment of costs, *Crompton* objected that the affidavit on which the rule had been obtained was irregular. The late rule of the

The rule of the Exchequer, H. 7 Will. 4, (as to the form of the affidavit on motion to set aside a regular attach-

ment or bail-bond), is an exact transcript of the rule of the King's Bench, M. 59 Geo. 3. The report of the latter in 2 B. & Ald. 240, which is adopted into the books of practice, is erroneous, in reading "for his and their only indemnity." The words of the original rule are "for his and their indemnity only."

Exch. of Pleas,
1838.

REGINA
v.
Sheriff of
CHESHIRE.

Exchequer, H. 7 Will. 4 (a), required that the affidavit should state the application to be really and truly made on the part of the sheriff or bail, "at his or their own expense, and for his or their indemnity only." The present affidavit varied from that form, being in the terms—"and for his *only* indemnity."

Butt, contra, urged that the meaning was substantially the same; and that, at all events, inasmuch as the parties had been misled by pursuing the language of the analogous rule of the King's Bench, M. 59 Geo. 3, which was in the terms "for his or their only indemnity," and was so stated in the books of practice (b), an amendment ought to be allowed.

PARKE, B., said that the affidavit ought to follow the prescribed terms of the rule, and it was therefore irregular; but under the circumstances, it might be amended. His Lordship then stated that the rule in this Court ought to be made to correspond with that in the King's Bench, of which it was meant that it should be an exact transcript, and suggested that a new rule should be drawn up for the purpose. On referring, however, to the original rule of the King's Bench, it was discovered that the words in fact were "for his and their indemnity only," and that the two last words had been inverted in the copy set forth in 2 B. & Ald. 240, and thence copied with the same error into the books of practice.

The objection was then waived, and the rule was made absolute on terms (c).

(a) 2 M. & W. 219.

(b) Tidd's Pr. 316; Archbold's Br. B. R., by Chitty, 147; Archbold's Practice of Country Attornies, 172, (where the author comments on the supposed variance between the rules of the King's Bench and Exchequer.)

(c) This case occurred before Parke, B., sitting alone, on the last day of Trinity Term, but is inserted here, it being considered desirable that the error as to the terms of the rule should be set right as soon as possible.

Esch. of Pleas,
1838.

Sir J. LUBBOCK, Bart. and Others v. EDWARD TRIBE.

ASSUMPSIT for money paid, and upon an account stated. Plea, non assumpsit. At the trial before Lord Abinger, C. B., at the London Sittings after Michaelmas Term, the facts appeared to be that the plaintiffs, who are bankers in London, in the course of their business, in the year 1835, became the bankers of a company for working copper-mines in Cornwall, called the Kellewerris Consolidated Mining Company, of which Henry Tribe, the brother of the defendant, was the secretary. About the time when they were asked to open the account, they received from the company a book containing the forms of receipts which were to be given, upon any money being paid in to the account of the company for the purchase of shares. On the 21st of November, 1835, a cheque was brought to the banking-house of the plaintiffs, drawn by the defendant on the Bank of England for 100*l.*, which he then paid in to the account of the company, and their clerk, Mr. Woods, gave a receipt for this sum on account of the directors of the company, in the following ordinary form :—

“ Kellewerris Consolidated Mining Company,
London, November 21st, 1835.

“ No. 29.

“ Received on account of the directors of the above company, the sum of one hundred pounds, being the deposit on 100 shares.

“ For Lubbock, Forster, & Clarke,
WM. WOODS.”

Some time in January 1836, Henry Tribe called upon the plaintiffs, and requested them to give the company

L. & Co., being the bankers of K., received on his account a cheque for 100*l.* from one E. T., drawn by him upon the Bank of England, which cheque was lost by L. & Co.

E. T., at the request of L. & Co., wrote to the Bank of England, requesting them not to pay the cheque if presented. E. T. was afterwards requested by L. & Co. to give them another cheque for the same amount, upon receiving an indemnity from all loss which he might sustain by so doing, which E. T. promised to do, and the indemnity was accordingly sent. E. T. subsequently wrote to L. & Co. to say he could not conveniently send the cheque, but that he would take the earliest opportunity of handing them the amount. L. & Co. were called upon and obliged to pay the amount

of the lost cheque to K.:—*Held*, under these circumstances, that an action by L. & Co. against E. T., for money paid, or on an account stated, could not be supported.

Exch. of Pleas,
1838.

Lynsack
v.
Tribe.

credit in account for 100*l.*, for which they had given the above acknowledgment, which was produced, and acknowledged by Mr. Woods to be in his hand-writing; but the cheque could no where be found, nor was any entry of it made in the plaintiffs' books. Inquiries were made at the Bank of England, but it was found that no such cheque had ever been presented there or paid. The defendant, at the instance of the plaintiffs, wrote a letter to the Bank of England, requesting them not to pay the cheque if presented. Several interviews took place between the plaintiffs and the defendants upon the subject, on which occasions he was asked to pay the 100*l.* or give another cheque for the amount, as the plaintiffs were bound to make good that sum to the company upon the receipt that had been given. Promises to settle the matter were made from time to time by the defendant, and the following letters also passed between the parties. The first was from the plaintiffs to the defendant, dated the 24th of March, 1836, and was as follows :—“ On or about the 23rd or 24th of November, we received on account of the Kellewerris Mining Company, a draft drawn by you on the Bank of England in favour of Mr. H. Tribe, dated on one of the above mentioned days, which draft was lost or accidentally destroyed by us, and notwithstanding we have endeavoured to find it by a diligent search, we have not succeeded : we therefore request the favour of your giving us a fresh draft in lieu of it for the same sum, *and hereby indemnify you from all loss* which you may sustain by so doing, and beg to thank you for the trouble you have already taken, in requesting the Bank of England to stop the missing draft in case it had been presented.” The second letter was an answer from the defendant to the plaintiffs, dated the 25th of March, 1836. “ Yours of the 24th instant brings under my notice what had escaped my attention ; I am leaving home to-day for a short time,

and send my book to the Bank to be made up; *on my return I shall have the pleasure of handing you a fresh draft, on the terms contained in your letter.*" The third letter was from the defendant to the plaintiffs, dated July, 1836. "I am very much annoyed at having allowed the lost cheque to be so long open between us; *I ought to be quite satisfied with the written indemnity sent by your highly esteemed firm, and it would have been a pleasure to me to have testified my complete satisfaction with it, by instantly handing you another draft, but in truth I have laid out so much in mining shares, without being able during the present year to realise anything near the prices I have paid, that I cannot conveniently send a cheque. The matter is constantly present to me, and I shall take the very earliest opportunity of handing you the amount.*" The plaintiffs deferred for some time to give credit to the company for this 100*l.*, but being pressed to do so, on the 21st of April, 1837, they credited their account with that sum. In May, 1837, they commenced this action against the defendant, to recover the sum of 100*l.* as money paid to his use. It was objected at the trial, that under the above circumstances, an action for money paid would not lie; but the learned Judge directed a verdict to be entered for the plaintiffs for the sum claimed, giving the defendant leave to move to enter a nonsuit. *Platt* having obtained a rule accordingly,

Book of Pleas,
1838.

LUSHOCK
v.
TRINN.

Maule now shewed cause.—It is not contended here that the plaintiffs have not a right to call upon the defendant to pay them the 100*l.*, but it is said that it cannot be done in this form of action. But this action is maintainable, inasmuch as upon the facts proved the case results to money paid to the defendant's use, and the jury were warranted in so finding. The defendant, by drawing this cheque upon the Bank of England, where

Exch. of Pleas,
1833.

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"
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he kept an account, authorized the Bank to pay the 100*l.* on his behalf; but this direction to pay the holders of the cheque (the company) 100*l.* turns out to be abortive from the loss of the cheque; that loss is made known to the defendant by the plaintiffs, who, at his request, indemnify him against the re-appearance of the cheque; and then, relying upon the defendant's engagement to pay the 100*l.*, the plaintiffs pay that sum to the company which the Bank of England was to have paid them for the defendant. The plaintiffs would not have undertaken to pay what the Bank of England ought to have paid, but for the loss. The plaintiffs are thus substituted for the Bank of England; and as the latter might have maintained an action for money paid if the cheque had not been lost, but had been presented to and paid by them, so also may the plaintiffs. It is in fact a payment made by the plaintiffs under a direction, express or implied, by the defendant. Such direction sufficiently appears from his letters. When the defendant says, "I will hand you a fresh draft on the terms contained in your letter," it is the same thing as saying "I will hand you the money." In his second letter, too, he says, "The matter is constantly present to me, and I shall take the very earliest opportunity of handing you *the amount*." [*Parke, B.*—Those letters were in 1836. The plaintiffs did not give the company credit for this 100*l.* till April, 1837.] They had allowed them to overdraw their account in consequence of the receipt of that sum. [*Lord Abinger, C. B.*—The defendant contends that the plaintiffs were under an obligation to pay this cheque at all events, and that it could not be called a payment on his account or to his use. *Parke, B.*—Is it not the same as if the defendant had said to the plaintiffs—"If you will pay your own debt, I will repay you;" that would not be money paid for the defendant.] But, secondly, if this

money cannot be recovered under the count for money paid, the action is maintainable upon the account stated. The evidence showed applications for payment of this sum by Woods and another clerk; an indemnity is given by the plaintiffs, and the defendant says, on receipt of it, "on my return I shall have the pleasure of handing you a fresh draft on the terms contained in your letter"—by which he was bound to hand to the plaintiffs a draft payable to bearer on demand. The amount is ascertained to be 100*l.*, and the defendant says, "The matter is constantly present to me, and I shall take the very earliest opportunity of handing you the amount." That is abundant evidence of a promise to pay, to support an account stated. [*Parke, B.*—It was a good consideration, perhaps, for a special action of assumpsit; but as regards an account stated, there was no antecedent debt.] If the defendant was bound to give a draft payable on demand for 100*l.*, he is in the situation of owing a debt for that amount. The plaintiffs say, "Pay us that 100*l.*," and defendant says, "I soon will pay you." That is an admission that 100*l.* is due, which amounts to an account stated.

Exch. of Pleas,
1838.

LUNBROCK
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Platt, in support of the rule.—Perhaps a count might be framed to enable the plaintiff to recover general damages for the breach of the agreement contained in these letters, but this action cannot be maintained on either count. To support the count for money paid, there must have been either an express authority directly given by the defendant for the payment, or an implied authority for that purpose, as in the instance of a surety paying a debt for his principal, or where a man becomes a party as indorser of a bill of exchange, and so has authority to pay it for the drawer and acceptor. But here the plaintiffs had no authority whatever to pay this money. The duty of the plaintiffs was a duty arising from having lost a document belonging

Bank of Place,
1838.

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to their customer, for which they were responsible. Then as to the account stated; the form of it shews that it cannot be supported in this case; it supposes an antecedent debt—a debt “before that time due and owing.” Here there was no debt at all due from the defendant to the plaintiffs—the cheque drawn upon the Bank of England could not make the defendant a debtor to them. The plaintiffs were never to receive the money for their own use; they were only the agents of the company.—He cited *Spencer v. Parry* (a), and *Hansard v. Robinson* (b), and was then stopped by the Court.

Lord ABINGER, C. B.—Whatever inclination we may feel not to allow Mr. Tribe to keep this money any longer in his hands, the Court are compelled to pronounce the objection Mr. Platt has taken to be a just one, and that the defendant was not a debtor to the plaintiffs; though I entertained a doubt upon it at the trial. It appeared that the defendant was indebted to the Kellewerris Company for certain shares, and when they threatened to bring an action against him for the amount, he said, “I have paid it (by cheque or note of hand) to your agents,” the plaintiffs. If he did so, and they afterwards refused or neglected to present the cheque at the proper time, and lost it, they are accountable to the Kellewerris Company, and he is not accountable to them: when they failed to present the cheque in due time, they made it their own, and they are bound to pay the company, and cannot recover from the defendant. Then as to the account stated: I have often observed that there is a good deal of confusion in the books on questions of accounts stated,—not the older books, but the modern ones; they lay down this, that where there is any promise to pay a sum of money as due

(a) Nev. & M. 770; 3 Ad. & Ell. 331.

(b) 7 B. & C. 90.

from A. to B., it is evidence of an account stated; which means this, that the simple promise, if it stand unexplained and uncontradicted, is evidence to go to a jury that the plaintiff claims that sum to be due, and that there are matters of account between the parties; it does not go further than that; and it is only when you come to look at the facts on which the promise was made, that you are enabled to see whether it is an account stated or not. Here there was nothing due from the defendant to the plaintiffs at all: the only thing in respect of which they had a claim upon him was upon his promise, and they might have had an action against him for not performing that promise, because no doubt it was made upon a good and sufficient consideration; but it was not in the nature of any debt due from the one to the other at all.

Reob. of Pleas,
1838.

Luttrell
v.
Trist.

PARKS, B.—I am of the same opinion. It seems to me that the action is not maintainable either on the count for money paid, or on the count upon the account stated. As to the count for money paid, the money was not paid on the account of the defendant at all. When he gave the cheque, and the plaintiffs received it to the account of the Kellewerris Company, they became liable to the company for the due presentation of the cheque. They, however, lost it, and the defendant became exonerated altogether; he was not liable to pay any more than he would be liable to pay through the means of his cheque. If it was a valid cheque, and would have been paid on due presentment, which I collect from the circumstances of the case, the plaintiffs would become responsible for the full amount of it to the Kellewerris Company. In that state of things, a correspondence takes place between the plaintiffs and the defendant, which amounts to a special agreement, that he is to give a fresh cheque if the plaintiffs will give him an indemnity; and on that

Exch. of Pleas,
1838.

LUNBROOK
v.
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agreement it appears to me an action might be maintained; but not, I think, for money paid, because the payment of the money does not exonerate the defendant from any liability at all; it is not money paid to his use; it is money paid to the plaintiffs' own use, who are bound to make good the amount to the Kellewerris Company. This case falls within the principle which was correctly laid down in the case cited by Mr. *Platt*, of *Spencer v. Parry*. I am therefore of opinion that the count for money paid cannot be supported in this case. Then as to the account stated. The form of that count is "for money found to be due from the defendant to the plaintiffs on an account then and there stated between them;" whereas, according to the correspondence between these parties, all that passed was a special agreement for the giving of another cheque; and if that were held to be an account stated for money due and owing, it would be going to a much greater length than the Courts have yet gone, in extending the meaning of the account stated. It appears to me that nothing more is to be collected from the letters, than a repetition of a special promise upon a sufficient consideration; and that the proper course to be pursued would have been for the plaintiffs to have brought an action for the breach of such promise.

BOLLAND, B.—I am of the same opinion. As to the count for money paid, it appears to me that it cannot be supported, for the reasons which have been given by my brother *Parke*; there was no debt at all that made the defendant liable for money paid. Then, in regard to the account stated, it was the only part of the declaration which I thought originally, when the case first came before us, could be supported; but I am now of opinion that that count also cannot be made available. The distinction taken by the Court in this case was taken also in the

case of *Tucker v. Barrow* (a). There *Bayley, J.*, states, *Exch. of Pleas, 1838.*
 that an admission of a subsisting debt is necessary as evidence to support an account stated. Here there was no subsisting debt at the time. *Lusbock v. Trish.*

ALDERSON, B., concurred.

Maule then applied for leave to amend:—

Sed per Curiam.—We have no power to direct an amendment. It would in fact be stating an entirely new cause of action.

Rule absolute.

(a) 7 B. & Cr. 624; 1 M. & Ry. 518.

TROUP v. BOFFI.

ASSUMPSIT to recover 100*l.* for goods sold and delivered, and the like sum upon an account stated. Plea, that heretofore and before the commencement of this suit, to wit, on the 12th July, 1837, at a Court then held by Thomas Barton Bowen, Esq., one of her Majesty's Commissioners for the Relief of Insolvent Debtors, at Dover, in the county of Kent, he the defendant, then being an insolvent debtor in actual custody, and a prisoner in the gaol of Dover Castle, by a certain order of adjudication then duly made in that behalf, was duly discharged according to a certain act of Parliament made and passed in the seventh year of the reign of his late Majesty King George the Fourth, intituled "An act to amend and consolidate the laws for the Relief of Insolvent Debtors in England," of and from the said several promises and causes of action and each and every of them, in the declaration men-

To an action of indebitatus assumpsit in 100*l.* for goods sold and delivered, &c., the defendant pleaded his discharge from the cause of action under the Insolvent Act; to which the plaintiff replied, that although he, the plaintiff, was named and inserted by the defendant in his schedule, yet he had not any notice of the filing of the petition, or of the time appointed for the

hearing upon it:—*Held*, on demurrer, that the replication was bad, as it did not allege that the plaintiff was a creditor to the amount of 5*l.*, so as to be entitled to notice under the 42nd section of the 7 Geo. 4, c. 57.

Esch. of Pleas,
1838.

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tioned, and the said order and discharge still remains in full force. Verification.

Replication.—That although the plaintiff was named and inserted by the defendant as a creditor of the defendant for and in respect of the causes of action in the declaration mentioned in the schedule of the defendant, and of and from the debts contained in which, and no other, the defendant was, by the said order in the said plea mentioned, discharged; yet the plaintiff in fact further says, that he the plaintiff did not at any time before the making of the said order, have any notice whatever of the filing of the petition upon which the defendant applied for his discharge as aforesaid, and of the said schedule, and of the time and place appointed for hearing the matters of such petition and schedule. And the plaintiff further says, that at and thence continually from the time of the filing of the said petition and schedule, until the making of the said order, he the plaintiff was resident within the United Kingdom, to wit, in the city of London, and he could and might, and ought to have been served with such a notice, according to the said statute, and whereof the said defendant always well knew. Verification.

To this replication there was a demurrer assigning the following causes:—For that the defendant hath by his plea pleaded that he was duly discharged from the several promises and causes of action in the declaration mentioned, according to the act of Parliament in the plea mentioned, and by the order of adjudication in the plea also mentioned, and that such order then remained in force, yet the plaintiff hath not by his replication denied the matters so pleaded as aforesaid, nor replied any matter or thing which shows that the defendant was not entitled to the benefit of the act, or that the defendant was not duly discharged according to the provisions thereof. And also, for that the plaintiff, although he hath by his replication admitted that he was named and inserted by the

defendant as a creditor of the defendant for and in respect of the causes of action in the declaration mentioned in the schedule of the said defendant, yet he hath not in and by his said replication replied any matter or thing sufficient to shew that the defendant was not duly discharged, but has relied upon the want of any notice to him the plaintiff before the making of the order for the filing of the petition upon which the defendant applied for his discharge, and of his schedule, and of the time and place appointed for hearing the matters of the said petition and schedule, whereas the omission to give such notice to the plaintiff was the omission of the Court for the Relief of Insolvent Debtors, or the omission or neglect of some officer thereof, and does not invalidate the discharge of the defendant, the schedule filed by the defendant having described the name of the plaintiff and the causes of action in the declaration mentioned: and also for that the matter relied on by the plaintiff in his said replication, namely, the want of notice, if any objection at all, is at most only a ground for applying to the Court for the Relief of Insolvent Debtors to rehear the matters of the said petition of the defendant, or to review, vary, or discharge the said order, and is no answer in this action to the order discharging the defendant, so long as the same remains a record of the said Court for the Relief of Insolvent Debtors, in no wise reversed, annulled, set aside, or otherwise vacated. And also, that the plaintiff having replied that he had not at any time before the making of the said order any notice whatever of the filing of the said petition, and that he, the plaintiff, was resident within the United Kingdom, and could, and might, and ought to have been served with such notice, must be taken by his said replication to have relied on the want of notice to himself personally, yet the plaintiff hath not averred or shown by his said replication that he was a creditor whose debt amounted to the sum of 5*l.*, or that he was in any otherwise entitled to such notice.

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1838.

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v.
BOYLL.

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1838.

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And also, that it does not appear with sufficient certainty in or by the said replication, whether the plaintiff relies on the want of notice to himself personally, or that no notice was given in the London Gazette, and by reason thereof the defendant cannot take any safe or certain issue thereon.

Jervis, in support of the demurrer.—The replication admits that the plaintiff was properly described in the schedule, and that the defendant was discharged from the debts contained in it; but the objection is, that the plaintiff was not personally served with a notice of the filing of the petition. The question turns on the construction of several clauses of the 7 Geo. 4, c. 57. The tenth section points out in what cases, and under what circumstances, persons in custody may apply to the insolvent Court for their discharge. The 40th section enacts, that after petition filed, the prisoner shall deliver in a schedule containing a description of his debts, and of all and every person and persons to whom such prisoner shall be indebted, and a full account of his property. The 41st enacts that the Court shall provide a time and place for hearing the petition and schedule. Then comes the 42nd section, which enacts, “That the Court shall cause notice of the filing of every such petition and schedule, and of the time and place so appointed as aforesaid, for hearing such petition and schedule, to be given *by such means as the Court shall direct*, to the creditor or creditors at whose suit any such prisoner shall be detained in custody, or the attorney or agent of such creditor or creditors, and to the other creditors named in the schedule of such prisoner, and resident within the United Kingdom, and whose debts shall amount to the sum of 5*l.*, and to be inserted in the London Gazette, and also, if the said Court shall think fit, in the Edinburgh and Dublin Gazettes, or either of them, and also in such other newspaper or newspapers as the said Court shall direct.” The first observation is, that the notice is to be given to persons

whose debts amount to 5*l*., but here it is not shown that the plaintiff's debt amounted to that sum, and therefore it is not made out that the plaintiff was entitled to notice at all. This action being in assumpsit for unliquidated damages, it cannot be collected what is the amount due. Again, it is for the Court to direct by what means notice is to be given; and how is this Court to know the practice of the Insolvent Court, and in what manner notice has been directed to be given? If the practice of the Court has not been complied with, the practice ought to have been set out, and a non-compliance with it shewn. The Insolvent Court having discharged the defendant, if they have done so improperly, it is their default and not the defendant's, and the plaintiff has no right to attempt in this way to review the decision of that Court. There are many authorities bearing indirectly upon this case. In *Dimond v. Clarke* (a), it was held, under the 37 Geo. 3, c. 90, that the debtor is only discharged as to those creditors to whom he has given notice of his intention to apply for his discharge; but such a notice is no longer essential. When the insolvent has misdescribed his creditors in his schedule by mistake, and with no intent to deceive, it has been held to be a good discharge notwithstanding. *Reeves v. Lambert* (b), *Nias v. Nicholson* (c). Those cases could not have arisen if it had been necessary to serve the creditor personally. The 60th section may perhaps be relied upon, but that does not require such a notice as is here contended for. That section enacts, that no person who shall have become entitled to the benefit of this act by any such adjudication as aforesaid, shall at any time thereafter be imprisoned by reason of the judgment as aforesaid entered up against him or her, &c., but that upon every arrest or detainer in prison, upon any

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(a) 1 Chit. Rep. 222.

(b) 4 B. & Cr. 214.

(c) 2 Car. & P. 120; Ry. &
M. 322.

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such judgment &c., it shall and may be lawful for any Judge of the Court from which any process shall have issued in respect thereof, and such judge is thereby required, to release such prisoner from custody, unless it shall appear to such judge, upon inquiry, that such adjudication as aforesaid *was made without due notice, where notice is by this act required*, being given to or acknowledged by the plaintiff of such process, *or by him or her dispensed with, by the acceptance of a dividend under this act, or otherwise.*" If the 67th section is looked to, it will be seen that the adjudication of the Insolvent Court is to be final and conclusive, unless it has been *improperly made or fraudulently* obtained; in which case, upon the application of the prisoner or a creditor, the matter may be re-opened and re-heard, and a fresh adjudication made according to the merits. This adjudication cannot be said to have been fraudulently obtained, since the amount of the plaintiff's debts was properly inserted in the schedule. The 46th section points out what the insolvent is to do to entitle himself to his discharge, and if that section is referred to, it will be seen that it never could have been intended that the insolvent should serve a notice on his creditors. He is to be discharged, not upon proof of notice having been given, but "upon such prisoner's swearing to the truth of his or her petition and schedule, and executing such warrant of attorney as hereinafter directed."—But the form of the replication does not raise the point as to the necessity of notice. It ought to have gone on and negatived the receipt of a dividend, as the plaintiff might have waived notice by such receipt. Or a notice might have been inserted in the London Gazette, and such a notice might have been ordered by the Court to be given.

Hoggins, contra.—A notice is necessary, and the replication is sufficient. The 46th section, which gives the power of discharge, has reference to the 42nd and 43rd

sections. The 42nd is the one requiring the notice to be given; the 43rd provides, that "at such hearing as aforesaid," that is, after such notice required by the former section has been given, the Court shall examine into the matters of the petition and schedule upon the oath of such prisoner, and of such parties and other witnesses as the Court shall think fit; and in case such notice as the said Court shall direct shall have been given by any creditor of his or her intention to oppose such prisoner's discharge, it shall be lawful both for the said creditor, and any other creditors, to oppose such prisoner's discharge, and for that purpose to put such questions to such prisoner and examine such witnesses as the Court shall think fit. That refers to the creditor who has received the notice required by the 42nd section, and who may thereupon give notice to oppose the prisoner's discharge. The cases of *Sharp v. Gye* (a) and *Pugh v. Holkham* (b) proceed upon the ground that notice to the creditor is necessary, as the question there was whether the notice had been given to the right persons. [Parke, B.—You do not aver that the plaintiff's debt amounted to 5*l*.] The declaration alleges that the defendant was indebted to the plaintiff in the sum of 100*l*., and this allegation is not laid under a *videlicet*, and is therefore, in pleading, though not for the purposes of proof, material; and the defendant by his plea admits the declaration to be true. [Parke, B.—No, not at all: no precise sum is admitted. It is only admitted that something is due, and then the defendant says, whatever that sum is, I am discharged from it by the Insolvent Debtor's Act.] *Hoggins* then applied for leave to amend.

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1838.

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PARKE, B.—It cannot be any benefit to you to amend, as I apprehend there is no order of the Insolvent Court requiring a personal service of such a notice. The In-

(a) 4 Car. & P. 311.

(b) 5 Car. & P. 376.

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1838.

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solvent Court has power to decide what notice is sufficient, and I understand that they actually decided that you had sufficient notice; if so, you cannot gainsay it, or improve your case by amendment.

ALDERSON, B.—If there has been any thing improperly done in the Insolvent Court, should you not move to set aside the adjudication, under the 67th section? otherwise we are called upon to try in this Court, upon pleadings, the practice of the Insolvent Court.

Judgment for the defendant.

SAMUEL v. SIR J. DUKE, JOHNSON, and FORD.

Although the goods of a debtor are bound from the delivery of a writ of execution to the sheriff, yet the property in them is not changed by it, and is still in the debtor, and he may sell them, subject to the rights of the execution creditor, to which they will be liable in the hands of a purchaser, unless the sale took place in market overt.

In trover against the sheriff and the execution creditor for taking

TROVER for certain goods and furniture, of which the declaration stated that the defendant was lawfully possessed as of his own property. Pleas; 1st, not guilty; 2ndly, that the plaintiff was not possessed of the goods and chattels in the declaration mentioned, or any part thereof, in manner and form, &c.; on which issues were joined. At the trial before Lord Abinger, C. B., at the London sittings after Hilary Term, it appeared that the action was brought to recover the value of a quantity of goods sold by the defendants Duke and Johnson, under a writ of fi. fa. lodged with them as sheriffs of Middlesex, on the 10th of December, 1836. It appeared in evidence that in the month of September 1836, a Mr. Browning, being in want of some money, had applied to the defendant Ford, who lent him the sum of 700*l.* to be repaid in three months, taking as a security a warrant of attorney for 1,400*l.* Browning not having paid the money when it

goods under an execution, it is not competent for the sheriff, upon the plea of not possessed, to give in evidence certain facts justifying the seizure, distinguishing his case from that of the other defendants; but such a defence should be specially pleaded.

became due, Ford entered up judgment upon the warrant of attorney, and issued a *fi. fa.* against the goods of Browning, which was lodged at the office of the sheriff of Middlesex on the 10th of December, 1836, with instructions to levy upon the goods of Browning at his chambers in Lincoln's-inn-fields. The officer made repeated attempts to execute the writ, but could not gain admittance into the chambers; in consequence of which, on the 19th of December, Ford went with the officer to a house in Park Lane, where Browning had resided with his sister, to make a levy upon the goods there; on their arrival, Browning was not at home, but his sister, who appeared, claimed the goods and furniture in the house as her own by purchase from her brother; and ultimately, upon her offering to Ford her own security for her brother's debt, the officer withdrew from the house. On the 2nd of January, 1837, Browning was arrested at the suit of another creditor, and went to prison. Ford was at that time sent for by Browning and his sister, when it was agreed that he should make a further advance to satisfy the debt for which Browning was then in custody, upon the security of the furniture in Lincoln's-inn-fields, if upon valuation it should turn out to be worth the sum required. In order to ascertain that, Browning delivered the key of his chambers to Ford, who had the goods valued. The valuation having been made, and the goods turning out not to be worth the sum required, Ford declined to make any advance upon the furniture, and returned the key, which he had kept a fortnight, to Browning. On the 5th of January, 1837, Miss Browning executed a warrant of attorney to Ford, as a collateral security for the 700*l.* and interest due from her brother; that sum to be payable by instalments, as follows:—

First instalment, 233*l.* 6*s.* 8*d.* on the 1st of April, 1837.

Second instalment, 233*l.* 6*s.* 8*d.* on the 1st of July, 1837.

Third instalment, 233*l.* 6*s.* 8*d.* on the 1st of October, 1837.

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Under this arrangement Ford received the first instalment, but not the interest, in April; and Browning swore at the trial that Ford told him, upon the execution of the warrant of attorney by his sister, that now his sister had executed a security for the money he owed him, all his (Browning's) goods were released. Upon the 15th of April, 1837, Browning, wishing to raise some money upon his furniture in Lincoln's-inn-fields, applied to the plaintiff for that purpose, who advanced him 300*l.* and received a bill of sale of the furniture and effects, and possession of them was then delivered to him. In May, another execution having issued against the goods of Browning, a levy was made upon the property in his chambers, but upon the production of the bill of sale by the plaintiff, the execution creditor withdrew. The writ lodged by Ford being afterwards discovered on search at the sheriff's office, the sheriff, after receiving an indemnity from Ford, sold the goods under his execution for the sum of 485*l.* 19*s.*; and this action was brought by the plaintiff to recover back that sum. The jury found that the transaction between the plaintiff and Browning was a bona fide transaction. It was objected at the trial that the plaintiff was not entitled to recover, inasmuch as no valid transfer of Browning's goods could be made after the delivery of Ford's writ of execution to the sheriff in December 1836, and that the goods were bound from that time as against any purchaser whatever. The jury found a verdict for the plaintiff, the learned judge giving the defendants leave to move to enter a nonsuit, if the Court should be of opinion that there was not, under the circumstances, sufficient evidence to go to the jury to warrant them in finding that Ford had abandoned his execution. *Platt* having obtained a rule accordingly,

Kelly and *R. V. Richards* shewed cause.—There was abundant evidence of Ford having abandoned his execution,

after the execution of the warrant of attorney by Miss Browning. The struggle at the trial was, whether the agreement with the plaintiff was *bonâ fide* or not; but the jury found that the bill of sale, executed by Browning in favour of the plaintiff, was a fair transaction and not a colourable one, and therefore that difficulty is removed. It is evident that Browning, at least, believed that Ford had abandoned his claim upon his goods. If that were not the understanding of both parties, Ford might have taken the goods in execution when he had possession of the key of the chambers, and had the goods valued. The circumstance of Ford's receiving the first instalment under the arrangement with Miss Browning furnishes also a strong evidence of abandonment; and Ford's telling Browning, that now his sister had executed the security, all his goods were released, (which must now be taken to have been found by the jury,) was further evidence of it. Although the writ was lodged in the sheriff's office in December 1836, returnable immediately, nothing was done upon it until May 1837; and the seizure was not made eventually upon the execution of Ford, nor had he taken any steps at all, until the goods had been taken in execution at the suit of another creditor. After this length of time had elapsed, the mere fact of the writ's remaining in the sheriff's office gives it no more value than if it had been returned to the custody of the party who issued it. [Lord Abinger, C. B.—The defendants contend, that assuming that there was evidence of abandonment to go to the jury, yet in point of law the goods were bound from the time of the delivery of the writ to the sheriff.] Where there is no laches on the part of the execution-creditor in having the seizure made, that may be so; but not in a case like the present, where there was abundant opportunity of making the seizure, which the execution-creditor neglected to avail himself of. The mere delivery of the writ to the sheriff has no effect in devestin

Book of Pleas,
1836.

Sheriff
of
Dorset.

East. v. Platt,
1838.

SIMON
v.
DREW.

the property; that is not altered until execution is executed. *Payne v. Drew* (a).

But, secondly, the defendants cannot be let into this defence upon these pleadings. They ought to have pleaded specially, setting forth the judgment obtained by Ford, and the writ of execution. Browning was originally the undoubted owner of these goods; then he transferred them to the plaintiff upon good consideration, and the plaintiff duly took possession of them pursuant to his bill of sale. [*Parke, B.*—The plaintiff must have a possessory right, to be entitled to maintain the action: the defendants say he has not that right, because Browning could make no valid assignment to him.] The transaction between the plaintiff and Browning was perfectly valid as against him and the sheriff, and cannot be impeached upon these pleadings. [*Alderson, B.*—Is not *Owen v. Knight* (b) against you? *Parke, B.*—At the moment of the conversion, has not the sheriff the possessory right to the goods?] In *Owen v. Knight*, the property was already in the possession of the defendant with the plaintiff's assent. There, whatever was considered the time of the conversion, the property was actually out of the plaintiff's possession. Here, on the other hand, the actual seizure being the conversion, as the plaintiff contends, up to that very time the possession was in the plaintiff. On the new rules, the plea of not guilty puts in issue the act of conversion only, and the plea of not possessed the property only; and if the defendant means to say that the plaintiff has only a qualified right, he ought to plead it specially.

Platt and J. Bayley, contra.—The assignment by bill of sale to the plaintiff was actually void; because the goods were bound by the delivery of the writ to the sheriff on the 10th of December. It may be conceded that the de-

(a) 4 East, 522.

(b) 4 Bing. N. C. 54.

livery of the writ of execution to the sheriff does not change the property, but it deprives the party of a right to assign the property after that time. Formerly the goods were bound from the teste of the writ; but by the Statute of Frauds, sect. 16, they are now bound from the delivery of the writ to the sheriff (a). The defendant is here claiming, not against process, but against alienation. In *Bennett v. Apperley* (b), it was held that under a writ of sequestration the property is bound from the time when the sequestrator is appointed. Nothing could shew more strongly that there had been no abandonment of the execution, than the fact of the writ not having been returned. [Parke, B.—Your argument would go to the extent, that if a man had any amount of property, and a very small part of it was enough to satisfy an execution which had been issued against it, the whole would be bound from the time of the delivery of the writ, and no transfer of any portion of it could be made. But, supposing the property passed to the plaintiff, subject to the sheriff's right to seize what is enough to satisfy the execution, are the pleadings in that case correct?] They are decided to be so in *Owen v. Knight*. There *Coltman, J.*, says, "I think that under the second issue" (on the plea of not possessed) "the right to possession is raised as distinct from the right to property." On the old rules of pleading, under not guilty, the defendant might shew that the right of property and possession in the goods was in himself. But now, under not guilty, the fact of conversion only is in dispute, but both the possession and the property are in issue under the plea of not possessed. [Parke, B.—The plaintiff says, they are my goods by assignment, and you have converted them; then assuming that the property passed to the plaintiff, what justification have you?] It must be admitted that nothing

Book of Rights,
1838.

SANDER.
DUNE.

(a) Tidd's Pr. 100; Com. Dig. Execution, D. 2.

(b) 6 B. & Cr. 630.

Each of Pleas,
1838.

SAMUEL
v.
DUKE.

was said at the trial as to there being any difference between the sheriff's case and Ford's, nor was any point made upon the pleadings.

Lord ABERNETHY, C. B.—I am of opinion that a nonsuit ought not to be entered in this case, and that there was sufficient evidence to go to the jury that Ford had abandoned his writ of execution. He had taken security from the sister; and if he had once abandoned the writ, his right upon it would not revive, though the sister did not comply with the terms of her engagement: he had stated too, upon receiving this new security from the sister, that the goods of Browning were released. Under this arrangement with the sister, Ford receives the first instalment of his debt in April. The fact also of Ford's having had possession of the key of Browning's chambers, for a fortnight or three weeks after the sister had promised her security, daring which time Ford made no claim to the goods, was a strong circumstance for the jury with respect to the abandonment. It appeared, too, that the sheriff, when called upon, would not act upon Ford's writ without a bond of indemnity. With regard to the sheriff, it is too late now to make any distinction as between him and Ford. None was made at the trial, but the parties all swam in the same boat: as no such distinction was then made, I think the verdict of the jury ought to stand. The question of abandonment was one of fact under the circumstances, and the jury would have been perfectly justified in finding that it had taken place. With regard to the *bonâ fides* of the sale to the plaintiff, I left that to the jury, certainly without any particular intimation to them as to the conclusion they should come to upon that subject. Upon the other point, I take it to be quite clear that the property is not changed by the delivery of the writ to the sheriff: it is still in the debtor, and may be dealt with by him, subject to the claims upon it. It is merely bound from

that time so as to enable the execution creditor to pursue it with all his rights, unless under special circumstances; the property is not changed until sale by the sheriff: *Payne v. Drewe*. I believe it has been held so frequently, and I think it is quite plain that Browning had a right to assign his property, subject to all the obligations which attached upon it as regarded any other person, and that therefore the property passed to the plaintiff notwithstanding the delivery of the writ to the sheriff. Mr. *Platt* contended that the effect of the words in the Statute of Frauds was to make the property itself unchargeable, except in market overt; I did not concur in that view of the matter, but reserved the point for him. Upon the whole, I am of opinion that the rule must be discharged.

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1838.

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&
BONA.

PARKE, B.—I am of the same opinion, and think the rule ought to be discharged upon the point reserved at the trial; namely, whether there was evidence to go to the jury that Ford had abandoned his writ of execution. My Lord thought that there was, but gave Mr. *Platt* leave to move upon this ground. The jury having found that the transfer of the property to the plaintiff was *bonâ fide*, one difficulty is removed out of his way; but then the defendants contended that the transfer was not good in law, as it took place after the delivery of the writ to the sheriff. Now it is perfectly clear to me, both upon decided cases and the reason of the thing, that after a writ of execution has been delivered to the sheriff, the defendant may convey his property; but that the sheriff has a right to the execution notwithstanding the transfer. Since the Statute of Frauds, the right which was given to the sheriff by the writ to seize property, no longer speaks from the teste of the writ, but from the time of its delivery, upon the receipt of which the sheriff is to levy; but, subject to the execution, the debtor has a right to deal with his property

Book of Rites,
1838

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&
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as he pleases; and if he transfers it in market overt, the right of the sheriff ceases altogether. It appears, then, that the property passed to the plaintiff by a *bonâ fide* transfer. But it was contended by Mr. *Platt*, that as the delivery of the writ to the sheriff was prior in point of time to this transfer, the sheriff had a right to go on and levy; but the answer was that Ford, at whose suit the execution issued, had agreed to abandon it. Upon that my Lord expressed his opinion, and if there was evidence of abandonment to go to the jury, Mr. *Platt* was to take no benefit by his motion, unless the Court should be of opinion that in point of law the goods were bound by the delivery of the writ, and no transfer could be made. By that reservation we are bound: and I think there was quite sufficient evidence to go to the jury that Ford had agreed to abandon that writ. If, therefore, after that, these goods were seized by Ford, he was liable to an action at the suit of Browning, or any purchaser from him. It seems to me that under such circumstances Ford would be clearly liable in an action of trespass for the seizure of the goods and subsequent sale of them. If a distinction had been made at the trial between him and the sheriff, I should have doubted whether the sheriff could have been made responsible in this case upon different pleadings. The sheriff is to look to the writ only, and he would be justified under it in seizing all that were Browning's goods at the time of its delivery to him, unless he had received a countermand from Ford himself: the sheriff is not concluded by having received an indemnity from Ford. I think there was hardly sufficient evidence of any such countermand. But the sheriff is not now in a condition to ask for a verdict in his favour, as no distinction between the parties was made at the trial. I take it to be perfectly clear that the property passed to the plaintiff, and that the sheriff was justified in the seizure of that property, unless the plaintiff was in a condition to show

that at the time of the conversion he had the lawful possessory right to the goods. If the conversion had been *the sale of the goods*, then the sheriff must have previously seized, and probably it would have been competent to him, under the denial of the plaintiff's right of possession, to show, that at the time of the sale of the goods, the plaintiff had no possessory right, but that the sheriff had the right to seize them. But the case is different if the conversion complained of be *the act of seizure*. I entertain a strong opinion that under these pleadings it was not competent to the sheriff to enter into this defence at all. I think, therefore, that the rule that has been obtained for a nonsuit or a new trial must be discharged.

Book of Flood,
1838.

SAMUEL
v.
BURN.

BOLLAND, B.—I am of the same opinion. It appears to me that the extent to which the argument has gone to-day is much wider than the rule that was granted warranted, as the sole ground upon which it was moved was, that the delivery of the writ to the sheriff had bound the goods.

ALDERSON, B.—This rule was moved for on the ground that the goods were bound by the delivery of the writ, and that Browning had no power to sell them except in market overt; it therefore appears to me that the case has been discussed at unnecessary length. I quite agree with the view taken by my brother *Parke* upon the pleadings, and that in order to avail himself of this defence, the sheriff should have pleaded the circumstances specially. I think that is very clear.

Rule discharged.

East. of Pleas,
1838.

LUMLEY v. THOMPSON.

The rule requiring a term's notice before any step be taken in a cause, after the lapse of four terms, does not apply to a motion to set aside proceedings for irregularity, but only to any steps taken towards judgment.

PLATT having, on the part of the plaintiff, obtained a rule to set aside certain proceedings in this cause for irregularity,

Chilton, in shewing cause, objected that, as more than four terms had intervened since any step taken in the cause, (nothing having been done since Easter Term, 1836), no new step could now be taken without a term's notice; and referred to *May v. Wooding* (a), and the rule of C. P., E., 13 Geo. 3, there cited. In *Tipton v. Mecke* (b) where the plaintiff, having obtained a rule for a new trial, neglected to carry the cause down for more than four terms, the Court refused to discharge the rule on motion, without a term's notice having been given.

PARKE, B.—The plaintiff does not here seek to take any proceeding to judgment, but complains that the past proceedings are irregular, and applies to the equitable jurisdiction of the Court to have them set aside. The object of the rule requiring a term's notice is, that each party may be forewarned of the intention of the other to take any step in proceedings towards judgment, where they have been suspended for so long a period as four terms. That reason does not apply here.

Cause was then shewn on the merits, and on another ground the rule was

Discharged.

(a) 3 M. & Sel. 500.

(b) 8 Moore, 579.

Exch. of Pleas,
1838.

ATLEE and Others v. BACKHOUSE.

ASSUMPSIT for money had and received. Plea, non assumpsit. At the trial before Lord Abinger, C. B., at the London Sittings after Trinity Term, 1837, the following facts were opened on the part of the plaintiffs, and admitted between the parties:—

The plaintiffs, Messrs. Atlee, Young, and Bainbridge, in the year 1834, were partners in an extensive distillery at Wandsworth, the rate of their consumption being about 24 pipes of spirits to be delivered out per day. On the 1st September, 1834, they had placed in waggons on their premises, certain casks of spirits which were to be delivered out the following morning, and in respect of which request notes had been left at the Excise Office for permits, and for which permits would arrive in time the next morning to carry out the spirits. On the night of that day some of the officers of Excise came upon the premises, and seized all the spirits that were found there, as well in the vats of the store room as in casks in another part of the store, and in the casks which had been placed on the waggons, as being forfeited for a breach of the regulations of the excise laws. The alleged ground of forfeiture was, that in the night, when the officers were ab-

On the 1st September, 1834, a seizure of spirits was made by the officers of excise on the plaintiffs' premises.

The plaintiffs applied to the Commissioners of Excise for the restoration of the spirits; first, on security being given for payment of any penalties incurred; then, on payment of their value, to abide the result of the inquiry; which requests were refused. A writ of appraisalment having been sued out, in order to the condemnation of the goods, the plaintiffs proposed to the Commissioners to pay the amount at

which they were appraised, upon their restoration. The Commissioners answered "that they could accept no offer for the restoration of the seizure, the acceptance of which might prejudice the proceedings for penalties;" whereupon the plaintiffs stated, that, by their paying the money, "they gave up all claim to the seizure, and held themselves responsible for such proceedings for penalties as the Board might think fit to institute." The Commissioners thereupon agreed to restore the spirits; and accordingly, on the 11th September, the appraised value was paid by the plaintiffs to the defendant, the Receiver-General of Excise, and the spirits were restored to them. An information for penalties was subsequently filed against the plaintiffs, in which a verdict was taken for the Crown, by consent, for a mitigated amount of penalties. In November, 1836, the plaintiffs gave the defendant notice of action, and re-demanded the money:—*Held*, that the plaintiffs could not recover back the money so paid, in an action for money had and received, inasmuch as it was paid on a binding agreement, made upon good consideration, whereby the plaintiffs agreed that it should not be recoverable back; and further, that they were precluded from recovering by the provisions of the 7 & 8 Geo. 4, c. 53, s. 98.—*Held*, also, that, at all events, the action could not be maintained against the defendant, inasmuch as the money was received by him only for the purpose of its being paid over pursuant to the act of Parliament, and it was not shewn that it remained in his hands till he had notice to retain it.

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sent, the plaintiffs' servants had set the machinery at work which removed the spirits from the receiver into the store vats, in breach of the provisions of the 6 Geo. 4, c. 80, ss. 75 & 79: and it was contended for the plaintiffs, that assuming this to have been done in fraud of the revenue, (which the plaintiffs denied), the seizure of any spirits besides those which were actually so removed was clearly illegal. On the 2nd of September, the plaintiff, Mr. Atlee, addressed the following letter to the Commissioners of Excise:—

“ Honorable Sirs,

“ An extensive seizure of spirits has been made on the last night and this morning. Your Honors' officers will detail to you the whole particulars. We have to crave your Honors' indulgence that the spirits seized may be restored to us; we on our parts entering into bonds to give security for the payment of which penalty may have been incurred, upon the investigation of the case.

“ I remain, for partners and self,

“ Your Honors' obedient servant,

“ JOHN ATLEE.”

This proposition being refused, on the 4th of September Mr. Atlee wrote again as follows:—

“ Your Honors having rejected my petition for the restoration of our spirits, waggons, and utensils, on my giving security for the same, except as to the latter waggons, &c. &c., I have now to beg you will restore the whole on my paying into the hands of your receiver the value of the spirits, waggons, vat, and pump, &c. &c., of 6,500*l.*, to abide the result of trial or investigation.

“ For partners and self,

“ JOHN ATLEE.”

This and other similar applications having been also

rejected, on the 9th of September Mr. Atlee wrote as *Esch. of Pleas,*
follows :— 1838.

“ Honorable Sirs,

“ The officers of your Honorable Board having intimated to us that the removal of the spirits seized is in contemplation, we beg to assure your Honors that we are now fully occupied in investigating the subject, and we crave your indulgence that no steps be taken for the removal of the spirits in the present stage of the matter. Should your Honors require any security to be given by us against any improper interference on our part in the interim, we are perfectly ready to enter the same, in such manner as you may direct.”

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This request was not complied with, and a writ of appraisal having been sued out, with a view to proceeding by information in rem for the condemnation of the spirits, on the 10th of September Mr. Atlee wrote to the Commissioners as follows :—

“ Honorable Sirs,

“ Your Honors are aware that on the night of the 1st of September instant, an extensive seizure was made by your officers of spirits, vats, and waggons, upon our premises, for an alleged breach of the revenue laws on the part of our servants. Without entering now upon the merits of the case, we are most anxious to avoid the great anxiety attendant upon any legal proceedings, and to remove the grievous hindrance and interruption which the seizure of our property has unavoidably occasioned in the prosecution of our business: we therefore respectfully crave leave of your Honors that upon our paying the sum of 5,000*l.* the whole of the property seized should be restored to us.”

This offer being also declined, on the same day another letter was sent to the Commissioners in the same terms,

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except that the plaintiffs proposed the payment of the sum of 5,962*l.* 14*s.* (at which amount the goods had been appraised), in addition to a sum of 200*l.* which they had already paid on the restoration of their waggons. In answer to this letter, the commissioners made the following communication to Mr. Atlee:—"The Board cannot accept any offer for the restoration of the seizure, the acceptance of which may prejudice such proceedings as they may be advised to institute for penalties." On the same day Mr. Atlee wrote again to them as follows:—

"Honorable Sirs,

"I beg to state that by our paying the sum of 6,162*l.* 11*s.*, we give up all claim to the seizure, holding ourselves responsible for such proceedings for penalties as the Board may think fit to institute."

The Commissioners thereupon agreed to restore the spirits, &c. on receipt of the sum of 6,162*l.* 14*s.*, and that sum was accordingly paid by the plaintiffs to the defendant, the Receiver-General for the Excise, and the goods were restored to the plaintiffs. Afterwards, on the 13th September, the plaintiffs wrote to the Commissioners as follows:—"We beg to inform your Honors, that on the 11th instant, in accordance with your permission, we paid to the Receiver-General of Excise the sum of 5,962*l.* 14*s.* for the release of the spirits, vats, and other property seized upon our premises on the 1st of September instant. It is far from our wish or intention to enter into any argument with your Honors upon the question, but we beg most respectfully to submit to your Honors that as to twelve pipes of the spirits seized, there is room for your Honors' favorable consideration," &c. &c.

An information was subsequently filed by the Attorney-General against the plaintiffs for penalties, which came on for trial in the month of May 1835; and after a hearing of two days, a general verdict was taken by consent

for the Crown for 1,000*l.* (the amount of the penalties sought to be recovered being upwards of 18,000*l.*) which sum was accordingly paid over to the defendant. In November 1836, the plaintiffs first gave notice to the defendant of their intention to bring the present action, and demanded back the 6,162*l.* 14*s.*, as having been paid under constraint and without consideration.

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Upon this state of facts, it was contended for the defendant that the action could not be maintained, on two grounds; first, that the payment had been made voluntarily by the plaintiffs, in the course of a legal compromise; and secondly, that it was not shewn that it had not been paid over by the defendant according to the directions of the statute: and the Lord Chief Baron being of that opinion, directed a nonsuit.

In the following term, *Erle* obtained a rule nisi for a new trial, on the ground of misdirection, citing *Irving v. Wilson* (a), *Hills v. Street* (b), *Willoughby v. Backhouse* (c), and *Snowden v. Davis* (d).

The *Attorney-General*, the *Solicitor-General*, and *Kaye*, now shewed cause.—There are two grounds on which this action cannot be maintained. First, there has been a voluntary contract, in performance of which the money has been paid over by the plaintiffs, and the goods restored by them; that contract was a valid one, made upon good consideration, and therefore cannot now be rescinded. Secondly, the money cannot, at all events, be recovered from the defendant, who it is not alleged was guilty of any participation in the alleged illegal seizure, but merely received the money at the plaintiffs' request, in order to pay it over in due form and time, and must have so paid it over before he had any notice to retain or restore it.

(a) 4 T. R. 485.

(b) 5 Bing. 37; 3 M. & P. 96.

(c) 2 B. & Cr. 821; 4 D. & R. 539.

(d) 1 Taunt. 359.

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The stat. 7 & 8 Geo. 4, c. 53, s. 98, expressly authorizes the Commissioners of Excise to make such a compromise as was made in this case, where any prosecution has commenced for any penalty, or for the condemnation of any seizure made under the Excise Acts. There can be no doubt, therefore, of the *legality* of the contract on which this money was paid. That section contains a distinct provision, that after the receipt back of the goods on such compromise, the proprietor shall not maintain any action for any recompence or damages for the seizure or detention of them: if so, a fortiori, he cannot maintain an action to recover back the money paid upon the compromise. But without reference to the act of parliament, this was clearly an agreement for good consideration, and binding upon the plaintiffs. The utmost they can allege is, that it was a doubtful question whether the seizure was legal or illegal. Then an agreement is come to, whereby the plaintiffs are benefited by the restoration of their goods without further proceedings, and the Crown is prejudiced by agreeing to restore them at the valuation made, which was most probably less than their real value, and not proceeding to condemnation. There is a damage to the promisee, and a benefit to the promiser, which constitute a sufficient consideration. If the agreement had continued executory, it might have been sued on. *Longside v. Dorville* (a) is a distinct authority that the giving up a suit instituted to try a doubtful question of law or fact, is a good consideration for a promise to pay a stipulated sum. This money, therefore, having been paid voluntarily, with knowledge of the facts, on a contract for which there was a good consideration, cannot be recovered back as money had and received to the plaintiffs' use.

The cases cited on moving for this rule are altogether distinguishable. In *Irving v. Wilson* (b), which was an

(a) 5 B. & Ald. 117.

(b) 4 T. R. 485.

action brought to recover back, as money had and received, a sum of 2*l.* 11*s.* which had been paid by the plaintiff to the defendants, who were officers of the customs, it appeared that the defendants had seized some hams which the plaintiff was sending by three carts to Carlisle, having obtained one permit for the whole, but two of the carts being, by some accident, at the distance of two miles behind the other; and the defendants, although the circumstances were explained to them, refused to restore the goods without payment of the 2*l.* 11*s.*, which the plaintiff accordingly gave them. There, there was no *bonâ fides* whatever; the seizure was manifestly illegal, and the taking of the money an act of mere extortion and fraud: the only defence that could possibly be made was, that the right of action had merged in a felony. The money, therefore, was in that case rightly held to be recoverable back as money had and received. Here it is not pretended that the defendant personally interfered in any way, or was at all cognizant of the seizure and subsequent proceedings. In *Hills v. Street (a)*, where a tenant who had been distrained on for rent requested the broker not to proceed to sale, and engaged, in consideration of his forbearing to do so, to pay his charges; and time was accordingly given, and the charges paid, but the tenant objected to the amount of them, and also to the amount of rent demanded; it was held that such payment was not voluntary, and that the charges, *if irregular*, might be recovered back as money had and received. If the amount of the charges had been liquidated and agreed upon when the money was paid, the correctness of that decision might perhaps be questioned; but it appears that it was only an agreement to pay "the charges" generally, and it was therefore held that *excessive* charges, extorted under colour of that agreement, might be recovered back.

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(a) 5 Bing. 37; 2 M. & P. 96.

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Willoughby v. Backhouse (a) only decided that a tenant does not waive his right of action, which has already vested, for an excessive distress, by entering into an arrangement with the landlord respecting the sale of the goods. On the other hand, there are many authorities strongly in point for the defendant. Thus, in *Lindon v. Hooper* (b), it was held that that assumpsit will not lie to recover back money paid for the release of cattle distrained damage feasant, though the distress was wrongful. So, in *Knibbs v. Hall* (c), where a party threatened with a distress for rent paid money when he might legally have defended himself, it was held that it was not a payment by compulsion, and could not be recovered back. The principle of these decisions is, that the party must make his stand in the first instance, and cannot, after having derived a benefit, and thrown a prejudice upon the other party, raise a question which must be considered as having been settled between them.

Secondly, this money was paid by the plaintiffs to the defendant, not to be applied to his own use, but to be paid over. The defendant is merely a channel to convey the money into the hands of the Crown, as much as if he were a mere porter or messenger. He receives it as the agent of the Crown, and pays it over according to his authority, without notice; he cannot therefore be liable for money had and received. [*Parke, B.*—I will put a somewhat analogous case: suppose a bailiff, professing to act for a third person, seizes your goods without any colour of right—you may sue him for money had and received; but suppose he has paid the money into a banker's, to be paid over to such third person, could you sue the banker?] Clearly not; and the defendant here is a mere bailee of the same kind. In *Snowden v. Davis* (d), where the party

(a) 2 B. & Cr. 821; 4 D. & R. 539.

(b) Cowp. 414.

(c) 1 Esp. 84.

(d) 1 Taunt. 359.

sued was the wrong doer himself, it was properly decided that *he* was not discharged by having paid the money over. But in *Greenway v. Hurd* (a), it was held that an action would not lie against an excise officer to recover back duties received by him after the repeal of the act imposing them, if he had paid them over to his superior. [*Parke, B.*—That was not a case where the money was obtained after a wrongful seizure—it was clearly a voluntary payment.] On both these grounds, the nonsuit was clearly right.

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1838.

ATTEST
J.
BLACKHOUSE.

Erle and *W. H. Watson*, in support of the rule.—At the trial, the case was never put upon the ground that the money had been paid over by the defendant before notice, but the cause turned altogether on the question of compromise. [*Lord Abinger, C. B.*—If the fact that the money was not paid over was material in the case, you ought to have proved it. I well remember saying, that unless the contrary were proved, I should presume the money had been applied by a public officer, as it was his duty to apply it.] First, then, with regard to the question whether this was a voluntary payment by way of compromise. The plaintiffs have a right now to assume, for the purpose of the argument, that the seizure was altogether illegal. That being so taken, the whole foundation of the defendant's argument fails:—a contract to pay a debt which was not due is void altogether. The whole distinction lies between the case of a *doubtful* claim, and of one which is *invalid* altogether. In *Longridge v. Dorville, Holroyd, J.*, says (b), “If a person is about to sue another for a debt, *for which the latter is not answerable*, the mere consideration of forbearance is not sufficient to render him liable for that debt. . . . The consideration of forbearance is a benefit to the defendant, if he be

(a) 4 T. R. 553.

(b) 5 B. & Ald. 122.

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liable; but it is not any benefit to him, if he be not liable." So, in Com. Dig., Action on the Case upon Assumpsit, F. 8, it is laid down that an action does not lie, if a party promise, in consideration of the surrender of a lease at will; for the lessor might determine it; unless *there was a doubt* whether it was a lease at will or for years. Here the possession of the goods had been changed by what the plaintiffs have a right to say was an illegal seizure: when so changed, an agreement made in order to obtain restitution of the goods was made without consideration, and does not bind the plaintiffs. No doubt, if money be paid with full knowledge of the facts, *and* voluntarily, it cannot be recovered back: but there is a series of authorities to shew that if it be paid when there is either a duress of the person, or a coercion of the goods of the party, the voluntariness is wanting, and the money may be recovered back: *Astley v. Reynolds* (a), *Fulham v. Down* (b). [*Parke, B.*—You will find that the old cases which say that *duress of goods* will avoid the agreement, are not law—there may be duress of the person, but not of the goods. It certainly seems to me that this was not a *voluntary* payment, and that unless there was a consideration for it, the plaintiffs are entitled to recover; but you must shew that there was no consideration.] *Shaw v. Woodcock* (c), *Hills v. Street*, and *Morgan v. Palmer* (d), are all authorities to shew that payments made under compulsion, in order to obtain a restoration of the property of the party, may be recovered back. In *Shaw v. Woodcock*, *Bayley, J.*, says,—"If a party has in his possession goods or other property belonging to another, and refuses to deliver such property to that other, unless the latter pays him a sum of money which he has no right to receive, and the latter,

(a) 2 Stra. 901.

(b) 6 Esp. 26, n.

(c) 7 B. & Cr. 73; 9 D. & R. 889.

(d) 2 B. & Cr. 729; 4 D. & R. 283.

in order to obtain possession of his property, pays that sum, the money so paid is a payment made by compulsion, and may be recovered back." In *The Duke de Cadaval v. Collins* (a), the plaintiff had been arrested by the defendant for a very large amount, which he did not owe him, and a written agreement was entered into between them, that, upon the plaintiff's paying him 500*l.*, he should be released. It was held that he was entitled to recover back the money so paid. That, no doubt, was a case of duress of the person; but there was a full and deliberate agreement between the parties:—and it is submitted that the payment is no less compulsory when made by the party at a time when he is suffering from coercion in respect of his goods, than when he is under duress of his person. The case of *Lindon v. Hooper* (b) is plainly distinguishable: there the cattle distrained were held only in pledge, and might have been got back at once by a replevin; and the case was decided on that ground. In *Knibbs v. Hall* (c), again, there was no actual coercion of the goods at the time of the payment, but a mere threat of distress. The fair result of the cases is, that if goods be illegally seized, whatever payment is made to obtain possession of them again is invalid, and the money may be recovered back. [Parke, B.—Although there is an agreement that the money shall be finally paid, and not recovered back? Lord Abinger, C. B.—All the cases you have cited were cases where both parties knew the act to be an illegal one. Parke, B.—I think you have a right to argue the case on the assumption that you can now prove the seizure to be illegal; but then there is nothing to shew that at the time of the compromise it was treated as more than a doubtful case.] In *Shaw v. Woodcock*, and *Morgan v. Palmer*, the party who received the money considered that he had a bonâ fide

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(a) 4 Ad. & E. 858; 6 Nev. & M. 324.

(b) Cowp. 414.

(c) 1 Esp. 84.

Arch. of Pleas, right to receive it. The question of the illegality of the transaction is not a question to be considered with relation to what the parties supposed at the time, but as it comes ultimately to be determined by the Court. The time when the *doubtfulness* of the law is to be determined is when the question comes before a Court of competent jurisdiction, who are to decide upon it: *Longridge v. Dorville*. Then, is it less coercion, because the plaintiffs wrote and said that the money should not be recoverable back? That is only continuing the coercion one step farther. The same explanation of the facts which prevents the money from being retainable, prevents the agreement for the retaining of it from being binding. Nor was there any more benefit to the plaintiffs, or more loss or prejudice to the Crown, in the present case, than there was in the cases cited. In all of them, the one party had parted with the possession of his goods, and had the benefit of their being restored to him, and the other party had the loss of his possession of them. In all of them there was a point in dispute which the party might have had discussed with some advantage to himself, and which he gave up by the restoration of the goods. [*Parke, B.*—But there is this difference, that here the Crown had a legal right to have the question discussed *forthwith*, by the proceeding in rem—a right which no subject has.] The only difference is, that that would be a suit against the plaintiffs *and all the world*, instead of being a suit between the parties only. What distinction in principle can there be as to what description of suit the party gives up? The seizure being assumed to be illegal, the Crown have surrendered no valuable right whatever, but have only given up the right of trying a suit which would have been decided against them. The proceeding in rem is, in truth, a more complicated remedy than by information, since any party may come in and traverse the right. As to the benefit said to be received by the defendants by the amount

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paid being less than the full value of the goods, there was no abatement whatever made from the valuation, but they were taken at the marketable value. The whole proceeding was under the same coercion, and if it was founded on an illegal consideration, the plaintiffs were no more bound by the agreement than by the payment.

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But it is said that there is a statutable validity given to this compromise, as it is termed, by the 7 & 8 Geo. 4, c. 53, s. 98. But that is only "where a forfeiture shall have been incurred," which datum is here assumed to be wanting; or where a prosecution shall have been commenced "under or by virtue of the act," or of any of the acts relating to the excise. [*Parke, B.*—If the clause only applied to cases where the seizure was strictly lawful, the proviso at the end would be perfectly useless: what action could be brought in such cases? The object seems to have been to protect the commissioners from molestation under these very circumstances.] At all events, there is no ground for saying that the Crown did compromise, or mitigate the penalties under this clause; they forewent no part of their claim with any benefit to the opposite party.

Secondly, the action is maintainable against the present defendant. Against whom can it be brought but against the party who receives the money? One party uses the force; the other, being an independent officer, receives the money paid in consequence of that force. It is no answer that he may have paid it over to third parties.

Lord ABINGER, C. B.—All the cases that have been cited, if they are examined properly, and without the bias that naturally belongs to counsel who examine them in support of their client's case, will be found to be cases of this nature—when property has been unlawfully seized, or unlawfully detained, for the purpose of enforcing the payment of money that was not due. In all those cases,

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(and there is a great series of them) the party against whom the goods have been wrongfully seized or detained, is entitled, after payment of the money, to bring an action for money had and received, to try the right: as in the case of tolls,—where a man seizes property for toll, and exacts more than is due, the party is entitled to bring an action for money had and received: and so in the case of the having possession of a licence, the property of the plaintiff, and refusing to deliver it unless more money is paid than is due, as in *Morgan v. Palmer*; in all those cases it will be found that the seizure and detention were *for the purpose of exacting money*. Now this case is not of that character: these goods were not seized for the purpose of obtaining money; the seizing officer did not apply for money; the Commissioners did not apply for money; the applications to pay the money were by the plaintiffs themselves; they solicited the Commissioners of Excise to do the act—they offered to pay the value of the goods; the Commissioners refused to accede so long as any right that the Crown possessed might be compromised: a negotiation took place, and in the course of that negotiation the Commissioners, acting *bonâ fide* upon the supposition that they were only doing their duty to the public, refused to comply with any request made to them which could leave any shadow of doubt of the right of the Crown to prosecute this claim to the utmost; but when all these rights were cleared up by the several propositions of the plaintiffs, that they would give the estimated value of the goods, upon condition that the Crown would restore them, and would forego the process by information for their condemnation, and that they, the plaintiffs, moreover, held themselves responsible that this compact, so made, should not prejudice the right of the Crown in proceeding for the penalty for duties—then, and not till then, the Commissioners assent, the goods are restored, and the money is paid. I confess it appears to me,

that if the plaintiffs could, after this, properly urge any thing respecting the merits of the case, for the purpose of establishing their claim to recover in this action, by the same rule; if the Crown had prosecuted for duties, they might have said—"We set up this agreement against it—you have given back the goods—you have not proceeded for a forfeiture, and therefore you cannot proceed for a penalty; we insist upon the fact that the restoring the goods is an admission that you had no right to seize them." Could they have done that? Then what is the situation that the Crown is placed in? If this argument were successful, the Crown having the right of proceeding to a condemnation in a summary way, by which, within six or eight weeks, the goods might have become forfeited, and the Crown entitled to costs,—if the Commissioners, acting for the Crown, without any influence upon their minds but a desire to do their duty to the public, and as far as they can to accommodate the plaintiffs, enter into this compact, that they will not proceed to condemn the goods, but will restore them on the parties paying the valued price, and abandoning all claim in respect of the seizure, and they do so accordingly, the plaintiffs are to say it is a duress upon them, and that they may any time within six years bring an action against the Crown, to try the same question which they would have tried by information, after inducing them to forbear—and so as that if the Crown fail, it is at their expense, whereas if they had failed in the information, the plaintiffs would have got back the goods, but the costs would have been paid by themselves.

Under these circumstances, it appears to me that if we were to lend ourselves to this argument, we should make it quite impossible for the Crown, (when I say the Crown, I mean the Commissioners of Excise or Customs,) to come into any species of arrangement, unless they were in a condition to prove at all times that the seizure was in all respects proper, and that at any distance of time within

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Exch. of Pleas, 1838. **ATLEE** v. **BACKHOUSE.** six years. It appears to me that in doing this, we should be coming to so extraordinary a conclusion, that I could hardly have supposed the proposition would have been stated at the bar. I think the rule ought to be discharged.

PARKE, B.—I concur in thinking that the rule ought to be discharged. I think we must assume that it was one of the facts of the case, that the money which had been paid by the plaintiffs, by the direction of the Commissioners, to Mr. Backhouse, the Receiver of the Excise, had been paid over by him, according to the Act, before notice that the plaintiffs meant to dispute the validity of the seizure; and if that was the case, no action would lie against Mr. Backhouse, even upon an invalid seizure. Supposing there were nothing more in the case—no compromise or agreement of any kind—an action might be brought for money had and received against the excise officers who had been parties to the illegal act; but it does not follow that an action will lie against the person to whom they pay the money, for the purpose of its being paid over to other persons. The ground upon which an action will lie against a bailiff, who is the mere officer of the sheriff, is that the money is not paid for the purpose of handing it over to the sheriff, but of getting rid of an illegal execution; and that is the ground upon which it is put by Lord Chief Justice *Mansfield*, in the case of *Snowden v. Davis* (a); where he says—"The plaintiff pays the money under the terror of process, to redeem his goods, not with an intent that it should be delivered over to any one in particular." In this case, therefore, in the absence of any other circumstances, the action might lie against the officer of excise who made the seizure, but it would not lie against Mr. Backhouse, who was merely the hand to receive the money to be paid over to other persons, unless notice had been given to retain it whilst

(a) 1 Taunt. 363.

the money was in hand. Assuming that to be the case, *Exch. of Pleas,* there is no doubt that the plaintiff was properly non-
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But Mr. *Erle* having urged that that was not the exact ground upon which the nonsuit proceeded, I will observe upon the ground upon which it did proceed. The ground upon which it did proceed was, that this payment having been made to the Commissioners of Excise upon the agreement entered into with them, could not be recovered back: and I think it could not. In the first place, I think the plaintiffs are precluded from recovering it back by force of the provision of the Act of Parliament of the 7 & 8 Geo. 4, c. 53, which was very properly brought before the Court when this motion was made by Mr. *Erle*, but to which I did not then pay so much attention as I have since done. It appears to me, that whether the seizure was rightly or wrongly made, the Commissioners cannot be called upon to refund the money; under the second branch of the 98th section, which, in the event of a compromise taking place where a prosecution has been commenced, declares that the money shall not be recovered back: and this seems to me a provision wisely introduced, for the purpose of preventing questions of this kind from being agitated; for it was of great importance to prevent questions of revenue from being long unsettled, and therefore the legislature has said, that if there be a compromise by the payment of the value of the goods, that shall be final and conclusive, and shall not be brought again into litigation. Upon that ground, it appears to me that the plaintiffs cannot recover in this action.

When the matter was first brought before the Court, I felt considerable doubt whether, independently of the act, this could be considered as a binding compromise between the parties; but upon full consideration of the matter, it seems to me that this is, even independently of the Act of Parliament, a binding engagement.

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There is no doubt of the proposition laid down by Mr. *Erle*, that if goods are wrongfully taken, and a sum of money is paid, simply for the purpose of obtaining possession of those goods again, without any agreement at all, especially if it be paid under protest, that money can be recovered back; not on the ground of *duress*, because I think that the law is clear, although there is some case in *Viner's Abridgment* to the contrary (a), that, in order to avoid a contract by reason of duress, it must be duress of a man's person, not of his goods; and it is so laid down in *Sheppard's Touchstone* (b):—but the ground is, that it is not a voluntary payment. If my goods have been wrongfully detained, and I pay money simply to obtain them again, that being paid under a species of duress or constraint, may be recovered back; but if, while my goods are in possession of another person, I make a binding agreement to pay a certain sum of money, and to receive them back, that cannot be avoided on the ground of duress. Then the question is, whether this was a binding agreement between the commissioners and the plaintiffs. There is no doubt that the parties, when they came to the agreement, *meant it* to be a final agreement that the goods should be delivered up by the commissioners to the plaintiff, and on the other hand, that the plaintiffs should never call in question the seizure, and should not seek to recover the money back for which the agreement was made; and the question is, whether there was consideration for that agreement, so as to make it binding in point of law. And it seems to me, upon the best consideration I can give the case, that there was a sufficient consideration to support that agreement. Neither of the parties must be taken to have treated it as an illegal seizure: the commissioners certainly did not. If they had known it to be an illegal seizure, there might be

(a) *Vin. Abr. Duress*, (B), 3; 1 *Roll. Abr.* 687.

(b) *P.* 61.

a question as to the validity of the agreement: but both parties enter into that agreement believing it to be a legal seizure; and the contract on the part of the plaintiffs is, that they will pay a certain sum of money; the contract on the part of the commissioners is, that they will give up the goods, and relinquish that suit which the Crown has the right to institute, and which is the peculiar privilege of the Crown, for the speedy determination of the question. The Crown foregoes the present benefit of the suit, and also the benefit of obtaining costs in case the plaintiffs should not succeed in their claim to the goods, and that appears to me to be a relinquishment of a benefit the Crown possessed, forming a sufficient consideration in point of law. On that ground also, it appears to me that this action cannot be supported. In the case of *Longridge v. Dorville*, there was not merely an agreement to deliver up the ship, but a limitation of the amount to be paid for the repairs; and one of the circumstances that exist in this case existed in that—the foregoing the valuable right of keeping the ship, in order to have the question litigated; that was barred by the payment of a sum of money. It seems to me, therefore, that upon the last ground also, though I entertained some doubt when the matter was first before the Court, this rule ought to be discharged.

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BOLLAND, B.—I am of the same opinion. Upon looking at the letters, from which the nature of the transaction is to be ascertained, it appears to me clearly that on the part of the plaintiffs it was a voluntary settlement that was proposed, and that there was full consideration for that voluntary settlement. On the face of the earlier letters, it is shewn that it was the object of Messrs. Atlee & Company, if they could possibly have got the return of the goods in question upon giving the value of them, to

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reserve to themselves the right of afterwards contesting the validity of the seizure. That was repudiated on the part of the Commissioners of Excise. They then made a proposition in which they offered to give security, which also was refused; and having made one or two proposals of the payment of money, all of which were rejected, they finally propose to the commissioners that they will pay the sum of 6,162*l.*, and will forego all question with respect to the validity of the seizure of the goods, leaving to the Commissioners of Excise the right also of proceeding for the penalties. That was acceded to on the part of the Commissioners of Excise; and they having reserved to themselves that right so to proceed, the money is paid, and immediately afterwards a letter is written, by referring to which I think it will be plainly seen that the interpretation put upon this transaction by the parties themselves was that which I feel myself bound to put upon it. Having paid the whole of the money, then this letter was written by Messrs. Atlee & Co., to the commissioners: [His Lordship read the letter of the 18th of September.] They do not pretend to touch the other question in terms; in the earlier part of the letter they say to the Commissioners of Excise, "that is all settled; we do not mean to raise any question at all about that;" and they request the Commissioners to take into their consideration the question as to a certain quantity of the spirits. It appears to me that the framers of these letters themselves have put that interpretation upon the transaction: and therefore I am of opinion that this rule must be discharged.

GURNEY, B.—I am of the same opinion. I think that this rule ought to be discharged, because it appears to me to be a case of compromise, for which I think there was a good consideration. The Crown gave up the possession of the goods: they gave up an advantageous position, and they gave up the right which of course they

had, of proceeding to a condemnation at the earliest possible period. If the arguments in support of this rule were allowed to prevail, the Crown would be placed in this extraordinary position, that they would be obliged to try the question at any time the other parties chose to bring their action within six years, when the witnesses might be dead, and all means of proving the case gone. It appears to me further, that the compromise is strictly warranted by the act of Parliament, and that the act meant to include a case of this description. It is a mercy to the subject to enable the Commissioners of Excise to compromise upon such terms as they should think proper in the exercise of their discretion. It is not necessary to advert to the other parts of the case, because I think upon the first ground there is quite sufficient to discharge this rule.

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Rule discharged.

ISAAC JONES, PATRICK BROWN, and WILLIAM THOMAS
DAVIES, v. JOHN WINWOOD.

BY order of the Lord Chancellor, the following case was sent for the opinion of this Court:—

By indentures of lease and release, bearing date respectively the 27th and 28th days of December, 1819, the re-

By indentures of lease and release, dated in December 1819, and by fine and recovery, certain lands were

settled to such uses as W. T. D. and F. his wife should, at any time during their joint lives, by deed or other instrument in writing duly executed, direct and appoint; and in default of appointment, to the use of W. T. D. for life, with remainder to trustees to preserve contingent remainders; then to the use of the wife for life, with remainder to trustees to preserve contingent remainders; then to the use of the sons of W. T. D. and F. in succession in tail general; and then to the use of their daughters in tail general, with cross remainders, and with remainder to W. T. D. in fee. In 1824, W. T. D. took the benefit of the Insolvent Act, and conveyed to the provisional assignee all his interest in the premises, which was subsequently transferred by the provisional assignee to the assignee of the estate, in the usual way. In September 1828, W. T. D. and F. his wife, in execution of their joint power of appointment, by indentures of lease and release conveyed the premises to trustees in fee, upon trust for the benefit of all the creditors of W. T. D.:—*Held*, that the power of appointment was not destroyed by the conveyance to the provisional assignee, and that the power was well exercised by the indentures of lease and release of September 1828, so as to convey the estate for life of the wife and the estates tail of the children to the trustees under that deed.

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lease being made between Thomas Hugh Jones, therein described, of the first part, William Davies, gentleman, therein described, and Alice his wife, of the second part, the above named plaintiff William Thomas Davies of the third part, William Williams, Esq., of the fourth part, Evan Davies, gentleman, of the fifth part, William Lewis, Esq., of the sixth part, and John Lloyd Williams of the seventh part, and by a fine and recovery levied and suffered in pursuance of the said indentures, a certain messuage, tenement, and lands, with the appurtenances thereunto belonging, commonly called and known by the name of Voelatt, situate and being in the parish of Killie Ayrton, in the county of Cardigan, and then or late in the tenure or occupation of the said William Thomas Davies, his tenants or assigns; also all that other messuage, tenements, and lands, with the appurtenances thereunto belonging, commonly called and known by the name of Plasbach, situate and being in the parish of Killie Ayrton aforesaid, in the said county of Cardigan, and then or late in the tenure or occupation of Job Davies, his undertenants or assigns; and also all that other messuage or tenement, and lands, with the appurtenances thereunto belonging, commonly called and known by the name of Tanygare, situate and being in the parish of Killie Ayrton aforesaid, in the said county of Cardigan; and all other the lands and hereditaments of them the said William Davies and William Thomas Davies, and each of them, in the said parish of Killie Ayrton, or elsewhere in the said county of Cardigan, were settled, after certain uses which have determined, to such uses, upon such trusts, and for such intents and purposes, and charged and chargeable in such manner, and subject to such powers of revocation and new appointment, and other powers, provisoes, declarations, limitations, and agreements, as the said William Thomas Davies and Frances his wife should at any time or times, and from time to time, during their joint natural

lives, by any deed or deeds, instrument or instruments in writing, to be by them jointly sealed and delivered in the presence of and attested by two or more credible witnesses, direct, limit, or appoint: and in default of and until such direction, limitation, or appointment, or in case any such should be made, then subject thereto, and when and as the estate or estates, interest or interests thereby directed and appointed, limited or created, should respectively end and determine, and in the meantime subject thereto, and as to such part or parts of the same premises, and all such estate and interest therein, of which no such direction, limitation, or appointment should be effectually made as aforesaid, to the use of the said William Thomas Davies and his assigns for and during the term of his natural life, without impeachment of waste; and from and immediately after the determination of that estate by forfeiture or otherwise in his lifetime, to the use and behoof of the said Evan Davies and his heirs, for and during the natural life of the said William Thomas Davies, upon trust to preserve the contingent remainders thereafter limited from being defeated or destroyed; and from and immediately after the decease of the said William Thomas Davies, to the use of Frances Davies, the wife of the said William Thomas Davies, and her assigns, for and during the term of her natural life; and from and immediately after the determination of that estate by forfeiture or otherwise in her lifetime, to the use and behoof of the said Evan Davies and his heirs during the life of the said Frances Davies, in trust to preserve the contingent remainders thereafter limited, from being defeated or destroyed; and from and immediately after the decease of the survivor of them the said William Thomas Davies and Frances his wife, to the use of the first son of the body of the said William Thomas Davies on the body of the said Frances his wife lawfully begotten, or to be begotten, in tail general; with remainder to the use of the second, third, and fourth, and

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all and every the son and sons of the body of the said William Thomas Davies on the body of the said Frances his wife lawfully begotten or to be begotten, successively in tail general; with remainder to the use of all and every the daughter and daughters of the body of the said William Thomas Davies on the body of the said Frances his wife lawfully begotten or to be begotten, as tenants in common in tail general, with cross remainders in tail general between and amongst the same daughters respectively; with remainder to the use of the said William Thomas Davies his heirs and assigns for ever.

By indentures of lease and release, dated respectively the 26th and 27th of March, 1822, the release being made between the said William Thomas Davies and Frances his wife of the first part, the said William Price of the second part, John Williams, Esq. therein described, of the third part, and John Herbert, Esq. therein described, of the fourth part, the said William Thomas Davies and Frances his wife, by virtue and in execution of the power or authority, powers or authorities, to them given or reserved for this purpose by the said indenture of release of the 28th of December, 1819, and the fine and recovery levied and suffered as aforesaid, and by virtue and in execution of all other powers or authorities in them vested, or enabling them in that behalf, did direct, limit, and appoint unto the said John Herbert, and to his heirs and assigns, all the hereditaments and premises mentioned and described in the aforesaid indenture of the 28th of December 1819, to hold the same unto the said John Herbert, his heirs and assigns for ever, to the use of the said John Herbert, his heirs and assigns for ever; subject to a proviso for the redemption of the same hereditaments and premises, on payment to the said John Herbert, his executors, administrators, or assigns, of the sum of 1,400*l.*, with interest at 5*l.* per cent., at the time and in manner therein mentioned, and that then, and upon

such payment, and at any time thereafter, the said John Herbert, his heirs or assigns, should and would, at the request, costs, and charges of the said William Thomas Davies and Frances his wife, or either of them, or any person or persons for the time being entitled to any estate or interest in the equity of redemption of the said hereditaments, by virtue of the indentures and fine and recovery before mentioned, or any exercise of the powers thereby given or reserved, reconvey and assure all the said messuages, lands, and hereditaments, with their appurtenances, to the uses, upon the trusts, and for the ends, intents, and purposes, and with, under, and subject to the powers, provisoes, declarations, and agreements, limited, declared, expressed, and contained concerning the same in and by the said indenture of release of the 28th of December, 1819, or as near thereto as might be, and circumstances would permit: and in default of payment of the said principal money and interest, an absolute power of sale is thereby given to the said John Herbert, his heirs and assigns, over the said mortgaged hereditaments.

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In the month of August, 1824, the said William Thomas Davies took the benefit of the acts for the relief of insolvent debtors in England, and by an order of the Court for the relief of such debtors, dated the 17th day of January, 1825, he was duly discharged under the said acts.

By an indenture bearing date the 6th day of August, 1824, and made between the said plaintiff, William Thomas Davies, then an insolvent debtor, and prisoner in the gaol of Cardigan, of the one part, and Henry Dance, of Lincoln's Inn Fields, in the county of Middlesex, gentleman, (the provisional assignee of the estate and effects of insolvent debtors in England, pursuant to the act of the 1 Geo. 4), of the other part, *all the estate, right, title, interest, and trust* of the said William Thomas Davies to all his real and personal estate and effects, in possession,

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reversion, remainder, or expectancy, (except the wearing apparel, and other such necessities of the said insolvent and his family, not exceeding in the whole the value of 20*l.*), were conveyed and assigned to the said Henry Dance, as such provisional assignee as aforesaid, his successors and assigns.

By an indenture of assignment, bearing date the 18th day of April, 1825, and made between the said Henry Dance, as such provisional assignee as aforesaid, of the one part, and the above named plaintiff Isaac Jones, of the other part, after reciting the last mentioned indenture, it is witnessed, that in obedience to the said act of parliament, and to an order of the said Court for relief of insolvent debtors, and for the nominal consideration therein mentioned, he, the said Henry Dance, at the request and with the consent of the said Isaac Jones, did convey, assign, transfer, and set over unto the said Isaac Jones, his heirs, executors, administrators, and assigns, all the estate, right, title, interest, and trust of, in, and to the real and personal estate and effects whatsoever and wheresoever, and of what nature or kind soever, which by virtue of the said recited indenture then were in any way vested in the said Henry Dance, as such provisional assignee as aforesaid, to hold, receive, and take all and every the said estate, effects, and premises, and every part thereof, with their appurtenances, unto the said Isaac Jones, his heirs, executors, administrators, and assigns, according to the respective natures, properties, and tenures thereof: in trust nevertheless for the benefit of the several persons named or specified as creditors, or as claiming to be creditors of the said insolvent, in his schedule filed in the said court, and against whose demands the said insolvent had been discharged by order of that court; and to and for such other uses, intents, and purposes, and in such manner and form as were in and by the said act of parliament expressed of and concerning the

same, and to and for no other use, intent, or purpose whatsoever.

Recd. of Pleas,
1838.

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Winwood.

By indentures of lease and release and appointment bearing date the 16th and 17th days of September, 1828, and made between the said plaintiff William Thomas Davies and Frances his wife, of the one part, and the said plaintiff Patrick Brown, and Jenkyn Beynon, gentleman, of the other part (but who never acted in the trusts of the now stating deed, and has since disclaimed the trusts thereof), the hereditaments and premises hereinbefore particularly mentioned and described were, among other hereditaments, by the said William Thomas Davies and Frances his wife, pursuant to and in exercise of the power of appointment to them reserved or given by the said indenture of release of the 28th day of December, 1819, and of a fine and recovery suffered in pursuance thereof, and of all and every power and powers enabling them in that behalf, directed, limited, and appointed, granted, bargained, sold, aliened, released, and confirmed unto the said plaintiff Patrick Brown and the said Jenkyn Beynon, their heirs and assigns; to hold the same unto the said Patrick Brown and Jenkyn Beynon, or the survivor of them, and the heirs and assigns of such survivor, upon trust to sell and dispose of the same hereditaments and premises, and to apply the monies arising therefrom in discharge of the debts of the said William Thomas Davies, and upon other trusts therein mentioned.

By articles of agreement made the 15th of November, 1838, between the said plaintiff Isaac Jones, (being the assignee of the said William Thomas Davies), the said Patrick Brown, and the said William Thomas Davies, of the one part, and Henry Quintyne Winwood, of the other part, they the said Isaac Jones, William Thomas Davies, and Patrick Brown, each of them according to their several and respective estates and interests in the said premises, thereby agreed to sell for the consideration therein

Bank of England,
1826.

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v.
WENWOOD.

reversion, remainder, or expectancy, (except the wearing apparel, and other such necessities of the said insolvent and his family, not exceeding in the whole the value of 20 $\frac{1}{2}$), were conveyed and assigned to the said Henry Dance, as such provisional assignee as aforesaid, his successors and assigns.

By an indenture of assignment, bearing date the 18th day of April, 1825, and made between the said Henry Dance, as such provisional assignee as aforesaid, of the one part, and the above named plaintiff Isaac Jones, of the other part, after reciting the last mentioned indenture, it is witnessed, that in obedience to the said act of parliament, and to an order of the said Court for relief of insolvent debtors, and for the nominal consideration therein mentioned, he, the said Henry Dance, at the request and with the consent of the said Isaac Jones, did convey, assign, transfer, and set over unto the said Isaac Jones, his heirs, executors, administrators, and assigns, all the estate, right, title, interest, and trust of, in, and to the real and personal estate and effects whatsoever and wheresoever, and of what nature or kind soever, which by virtue of the said recited indenture then were in any way vested in the said Henry Dance, as such provisional assignee as aforesaid, to hold, receive, and take all and every the said estate, effects, and premises, and every part thereof, with their appurtenances, unto the said Isaac Jones, his heirs, executors, administrators, and assigns, according to the respective natures, properties, and tenures thereof: in trust nevertheless for the benefit of the several persons named or specified as creditors, or as claiming to be creditors of the said insolvent, in his schedule filed in the said court, and against whose demands the said insolvent had been discharged by order of that court; and to and for such other uses, intents, and purposes, and in such manner and form as were in and by the said act of parliament expressed of and concerning the

same, and to and for no other use, intent, or purpose whatsoever.

Each. of Pleas,
1833.

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vs.
WINWOOD.

By indentures of lease and release and appointment bearing date the 16th and 17th days of September, 1828, and made between the said plaintiff William Thomas Davies and Frances his wife, of the one part, and the said plaintiff Patrick Brown, and Jenkyn Beynon, gentleman, of the other part (but who never acted in the trusts of the now stating deed, and has since disclaimed the trusts thereof), the hereditaments and premises hereinbefore particularly mentioned and described were, among other hereditaments, by the said William Thomas Davies and Frances his wife, pursuant to and in exercise of the power of appointment to them reserved or given by the said indenture of release of the 28th day of December, 1819, and of a fine and recovery suffered in pursuance thereof, and of all and every power and powers enabling them in that behalf, directed, limited, and appointed, granted, bargained, sold, aliened, released, and confirmed unto the said plaintiff Patrick Brown and the said Jenkyn Beynon, their heirs and assigns; to hold the same unto the said Patrick Brown and Jenkyn Beynon, or the survivor of them, and the heirs and assigns of such survivor, upon trust to sell and dispose of the same hereditaments and premises, and to apply the monies arising therefrom in discharge of the debts of the said William Thomas Davies, and upon other trusts therein mentioned.

By articles of agreement made the 15th of November, 1833, between the said plaintiff Isaac Jones, (being the assignee of the said William Thomas Davies), the said Patrick Brown, and the said William Thomas Davies, of the one part, and Henry Quintyne Winwood, of the other part, they the said Isaac Jones, William Thomas Davies, and Patrick Brown, each of them according to their several and respective estates and interests in the said premises, thereby agreed to sell for the consideration therein

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1861

1861
1862

mentioned; and the said Henry Quintyne Winwood did thereby agree to purchase and take, the hereditaments and premises hereinbefore described, and the inheritance thereof respectively, free from incumbrances, excepting a lease, if any such there was; of the tenement called *Voe hts Ucha*.

The benefit of the said articles of agreement has become duly vested in the defendant John Winwood.

In the month of August, 1885, the above named plaintiffs filed their bill of complaint in the Court of Chancery against the defendant John Winwood, thereby praying that the said articles of agreement, dated the 15th day of November 1835, might be specifically performed and carried into execution by the said John Winwood.

The said cause was afterwards at issue, and was heard before the Lord High Chancellor, on the 7th day of April, 1837, and by the decree of that date thereupon made, it was ordered and decreed that a case should be made for the opinion of the Barons of the Court of Exchequer, upon the following questions:—

First—Whether the power of appointment contained in the said indenture of release of the 28th day of December, 1819, was or was not destroyed by the said conveyance bearing date the 6th day of August, 1824, by the insolvent William Thomas Davies, of all his estate to the provisional assignee?

Secondly—If the power was not destroyed, what estate passed under the appointment made by the indenture of the 17th of September, 1828?

Sir W. W. Follett, for the plaintiffs.—The question is, whether the plaintiffs have a good title to this estate: and it is submitted that they clearly have. It is intended by this case to bring under the consideration of the Court the decision of the Court of Common Pleas in the case of

Badham v. Mee (a), which is thought to have been erroneously decided: even, however, if that shall be deemed a binding authority, this case is distinguishable from it. The assignee under the deed of August, 1824, would take the estate for life of the husband, and the reversion in fee, without the appointment. The only effect of the appointment would be to take away the life estate of the wife, and the estates to the children in tail. That being so, the question is whether the husband and wife could afterwards execute the power, so as to take away the estate tail to the children, and the wife's estate for life. This power is partly a power appendant, and partly a power in gross. In Sanders on Uses (b), the different kinds of powers are thus described:—"Powers are either appendant, or in gross, or altogether collateral; appendant, when the exercise of them, is in the first instance to interfere with, and to a certain extent to supersede, the estate of the donee of such power; in gross, when they do not commence until the determination of the estate of the donee: and collateral, where the donee has no estate at all in the property which is the subject of the power. A power reserved to a tenant for life to make leases in possession, is appendant; for by the exercise of it, the term created by it necessarily precedes the estate of the tenant for life to whom it is reserved. A power to a tenant for life to jointure, is a power in gross; for the jointure created by it must necessarily take effect after the death of the particular tenant." Now in this case, as has been observed, the power is partly a power appendant, and partly a power in gross; so far as respects the estates of the husband and wife, it is a power appendant; and so far as respects the estates to the children, it is a power in gross. A power in gross is not destroyed by a mere innocent assurance, but only by a tortious conveyance, such as a fine; but a power ap-

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(a) 7 Bing. 695; 1 M. & Scott,
14; S. C. † Mylne & Keen, 32.

(b) Vol. 1, p. 169.

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pendant would be affected by any conveyance by the donee without reserving the power. The same learned author, speaking of the destruction of powers (a), says:—
“ With respect to powers, so far as they are appendant, it may be considered as a principle that the donee of a power shall not be allowed, by the exercise of such power, to defeat any charge, estate, or incumbrance, which he himself had previously made or created; and therefore if a tenant for life, having a power of leasing, previously conveys his legal estate, the power of leasing, to the extent of such conveyance, will be defeated. So, when an estate is limited to A. for life, with remainder to B. in tail, with remainder to A. in fee, with a general power of revocation reserved to A., if A., by lease and release, not executed according to the forms required by the power, convey to C. in fee, he cannot afterwards exercise his power as to his own life estate, and his remainder in fee; but the power will remain as to the estate tail of B. So, the usual power of appointment limited to a purchaser, to prevent the dower of his wife attaching upon the estate, must be considered as a power appendant. And therefore, if a purchaser afterwards convey the fee by lease and release, or any other conveyance, without having had recourse to the power, the power is extinguished.”—This is quoted merely for general authority upon the point; and according to that statement of the law, this must be decided to have been a proper execution of the power. Again (b):—“ If there be tenant for life, with a power to make a jointure on an after taken wife, or to make a lease for years, to commence from his death, for the purpose of raising portions for his younger children, the power in each of these cases is in gross. ‘ These powers,’ says Lord Hale (c), ‘ may by apt words be de-

(a) P. 171, 172.

(b) P. 172.

(c) *Edwards v. Slater*, Hardres,
410, 416.

stroyed by *release*, or by a *fine* or *feoffment*, which carry away and include all things relating to the land: but an assignment of *totum status suum*, or other alteration of the estate for life, does not affect such power.' Therefore, if a tenant for life convey by lease and release, or bargain and sale *in fee*, he does not destroy a power in gross reserved by him; for it is the nature of these conveyances to pass only what the tenant might lawfully convey." The only question will be, whether, after the donee had conveyed "all his estate" to the *provisional assignee*, he could afterwards execute the power, and convey the estate to the trustees for the benefit of creditors. The assignment of all the insolvent's estate to the provisional assignee would not destroy the power, according to *Edwards v. Slater*. A feoffment, fine, or recovery, would destroy a power, whether appendant or in gross, and whether it were a power for particular objects, or of a general nature: *Wes v. Berney* (a), *Bickley v. Guest* (b): but it would not be destroyed by a mere innocent conveyance, such as a lease and release. And the donee may still execute the power, if he has not done any act to destroy it. There is no distinction in this respect between a power of leasing and of appointing the estate. In Sugden on Powers, p. 65, it is said—"It appears that the cases have decided, that where a tenant for life has a power of leasing, he may exercise it, although he has conveyed away his whole life estate by way of mortgage or security, provided he has reserved to himself that right against the incumbrancer. *Long v. Rankin* (c). And even although in such a conveyance he has not reserved to himself a right to exercise his power as against the incumbrancer (d). But that he cannot, from the exercise of his power, defeat any incumbrance

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(a) 1 Russ. & M. 431.

(b) Id. 440.

(c) In Dom. Proc., reported 2
Sugden on Powers, 5th edit., Ap-

pendix, 539.

(d) *Ren v. Bulkeley*, Douglas,
292.

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which he has created. The cases appear also to have decided, that a tenant for life with a power of sale and exchange, may exercise it even where he has parted with his own life estate by way of mortgage or security, and although he has not reserved to himself the right to exercise the power against the incumbrancer. *Tyrrel v. Marsh (a)*." In that case, by marriage settlement, an estate was limited to the use of husband and wife for life, with remainder to the children of the marriage, and, in default of issue, to the right heirs of the husband and wife; and there was a power in the husband and wife to charge the estate during their lives, and a power to certain trustees, in whom the legal estate was vested, to sell on the direction of the husband and wife or of the survivor. The husband and wife borrowed money by way of annuity, created a term of 1,000 years, and levied a fine to G. in fee, which, by a deed to lend the uses, was declared to be "in trust to secure the regular payment of the annuity, and to corroborate the said term." It was held that this fine did not extinguish the trustees' power to sell on a direction of the husband and wife. The reason why a party is not allowed, after conveying his estate to another, to exercise a power of appointment inconsistent with that conveyance, is, that he shall not be allowed to derogate from his own grant. Now, what passed by this assignment to the provisional assignee? The husband's estate for life, and the remainder in fee; but not the estates tail to the children. The power, as respects those estates, would clearly remain unaffected by that conveyance. The 22nd section of the Insolvent Act, 7 Geo. 4, c. 57, differs very materially from the corresponding clause in the Bankrupt Act. After reciting that "whosoever many who may petition the said Court for relief under this act, may be seized and possessed of lands, tenements, and hereditaments, to hold for the term of their natural lives,

(a) 3 Bing. 31; 10 Moore, 305.

with power of granting leases and taking fines, reserving small rents on such estates, for one, two, or three lives, in possession or reversion, or for some number of years determinable upon lives, or have powers over such real or personal estate, which such persons could execute for their own advantage, and which said powers ought, on such persons' petitioning the said Court for relief under this act, to be executed for the benefit of the creditors of such persons;" it enacts, "that in every such case, all and every the powers of leasing such lands, tenements, and hereditaments, and all other such powers as aforesaid over such real or personal estate, which are or shall be vested in any prisoner who shall petition the said Court for relief under this act, and all trusts and powers, whatever vested in such prisoner, or created for his or her use or benefit, which such prisoner might execute for his or her own benefit, shall be and are hereby vested in the assignee or assignees of the real and personal estate of such prisoner by virtue of this act, so far as such prisoner could by law vest such power in any person to whom he or she might lawfully have conveyed such property; to be, by such assignee or assignees executed for the benefit of all and every the creditors of such prisoner, under this act" (a). Now, undoubtedly, under this act, such a power as this, to be exercised jointly with the wife, could not pass to the assignee. In the corresponding clause in the Bankrupt Act, 6 Geo. 4, c. 16, s. 65, there is a clause affecting estates tail; and in *Badham v. Mee* that section was a good deal relied upon. It enacts, that the commissioners shall, by deed indented and enrolled, make sale for the benefit of the creditors of any lands, &c., whereof the bankrupt is seised of any estate tail in possession, reversion, or remain-

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(a) The learned counsel also referred to the 11th, 16th, 19th, and 20th sections, as bearing on this question.

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der, &c., and every such deed shall be good against the bankrupt and *the issue of his body*, and against all persons claiming under him after he became bankrupt, and against all persons whom the said bankrupt, by *fine, common recovery, or any other means*, might cut off or debar from any remainder, reversion, or other interest in or out of the said lands," &c. The 77th section of the bankrupt act provides also, that all *powers* vested in any bankrupt, which he might legally execute for his own benefit, may be executed by the assignees for the benefit of the creditors, in such manner as the bankrupt might have executed them. The effect of the assignment under the Insolvent Debtors' Act is, therefore, no more than that of a conveyance by lease and release. Then the effect of it would be to vest in the assignees the husband's life estate and remainder in fee. He does not, therefore, derogate in any respect from his grant, by afterwards executing the power, and conveying the wife's estate for life, and the estate tail to the children. One of the objections made in *Badham v. Mee* was, that supposing the bankrupt to have retained the power, the bankrupt acts passed to the assignees the bankrupt's estate for life, and ultimate remainder in fee; and if so, that he could not defeat that remainder, or create a fee in derogation of his own previous grant. But in this case, who is interested in saying that the insolvent could not execute the power? Not the creditors: if he had the power, they are interested that he should execute it, as he did, for their benefit. The children, indeed, may be interested in saying that he could not execute it, but he has executed no grant to them. The power is here executed for the purpose of having the property divided equally amongst all his creditors. He does not thereby derogate from his former grant, so far as respects the estates tail, by exercising the power, and conveying the whole interest to the trustees. The assignee could only take the estate subject to such charges or incumbrances as it was

then liable to. Then he took under the settlement itself; and if so, he would take subject to the life estate of the wife, and the estate tail to the children. It is assuming the whole question to say that the subsequent conveyance is in derogation of the grant; that must depend on what the grant was; and if the grant was of the remainder in fee, subject to the power of appointment, the subsequent conveyance could not be in derogation of it. And here who is to object that this was in derogation of the former grant, but the grantee, the provisional assignee? But he does not object: he wishes the power to be executed. This distinguishes the present case from *Badham v. Mee* (a). In that case a father was tenant for life, with remainder to such of his sons as he should appoint, subject to charges for the other children; and in default of appointment, there were limitations to the sons successively in tail male, with remainder to the father in fee. The father became a bankrupt, and the Court of Common Pleas held that after the bankruptcy the father's power ceased, and that an appointment by him under the power, to a son in fee, was void. Sir *Edward Sugden* observes upon that case (b):—"This opinion was expressed upon a case directed by the Court of Chancery, and consequently we are left to conjecture the grounds of the judgment. It does not appear capable of being supported consistently with established principles. The father could not affect the ultimate remainder in fee vested in the assignees, but *as between the issue of the marriage* the power subsisted, and was capable of being exercised. As long as there was issue of the marriage capable of taking under the limitations in the settlement, the appointment would be operative; but if the remainder in fee would have fallen into possession if there had been

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(a) 7 Bing. 695; 1 M. & Scott,
14.

(b) 1 Sugden on Powers, 5th
edit., p. 80.

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no appointment, then the estate created by the appointment would cease. It is no objection that a remainder cannot be limited on a base fee, and that a fee could not have been limited upon a fee by the original settlement. For the ultimate remainder in fee which vested in the assignees, was not displaced out of them, and the appointment was in its operation cut down to a base fee by the power of the Bankrupt Act. The effect was no more than the common operation of a fine by a tenant in tail, with remainder in fee to another. And the bankrupt law ought not to be held to destroy the powers in a family settlement, when their existence and the exercise of them do not affect the rights of the creditors." He then added: "Since the above observations were written, the case came before the Master of the Rolls, when the confirmation of the certificate was opposed; and it was insisted, first, that the bankruptcy destroyed the power; secondly, that if not destroyed, the appointment was bad. The learned Judge said (a)—'It is conjectured in this case, from an observation by one of the Judges in the course of the argument, that the Court of Common Pleas decided against the validity of the appointment, on the ground that by the execution of a power no estate can be created, which would not have been valid if limited in the deed creating the power. If, therefore, it were admitted that the power of appointment continued in the bankrupt, notwithstanding his bankruptcy, and that the appointment in favour of the eldest son in fee might be construed as a power creating a base fee only, and not prejudicing the remainder which passed to the assignees under the commission, the appointment would nevertheless be void, because a limitation to that effect would have been void in the original deed creating the power, inasmuch as the rule of law does not permit one fee to be limited after another, although the

(a) 1 Mylne & Keen, 54.

first fee be only a base or determinable fee. This rule applies to the present case, in which the donee has a particular and a general power, and will support the opinion which has been formed by the Judges of the Court of Common Pleas.' As he confirmed the opinion of the Court of Common Pleas on this point, it was unnecessary, he said, that he should express any opinion on the other views of the case which had been taken in the argument at the bar; he therefore made his decree to the effect of the certificate." Sir E. Sugden then observes: "There appears to be no ground for the doubt suggested as to the extinction of the power; and the other point does not seem to have received from the Court the consideration which it deserves. If such a power cannot be exercised after the bankruptcy, the power of selection is gone, and in some cases the immediate limitation over, in default of appointment, may be to strangers. In *Badham v. Mee*, the knot was rather cut than untied, for the appointment was to the eldest son in fee, and the limitation in default of appointment was to him in tail, so that much mischief was not done by the decision in the particular case, however injurious it may be as establishing a false principle." That is an opinion of very high authority against the decision in *Badham v. Mee*. In Preston on Abstracts (a), it is said—"Also in those instances in which a person is tenant for life, with various remainders in strict settlement, with remainder to himself in fee, either with or without a power of appointment, and he makes a conveyance while the particular estates are continuing (being a conveyance which cannot operate as an exercise of his power for want of the observance of some ceremony); this conveyance will confer a title to the extent of the life estate, and of the remainder or reversion in fee. But this title will be defective against the intermediate particular estates."

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That passage also is entirely inconsistent with the decision of *Badham v. Mee*. The instance there put is exactly this case, except that this is the case of a joint power of appointment, which makes it stronger. It is submitted that on the principle of all the cases, *Badham v. Mee* was improperly decided; but independently of that, this case is distinguishable from it. This is the execution of a power for the benefit of the creditors, and therefore is not in derogation of the grant by assignment to the provisional assignee.

Sir *F. Pollock*, *contrâ*.—The power of appointment was destroyed by the assignment to the provisional assignee. The case of *Badham v. Mee*, which was decided so lately as the year 1832, has been acted upon by the Master of the Rolls, in a subsequent case of *Hole v. Escott* (a), and the defendants are not aware that any intimation has been given by the Lord Chancellor that the propriety of that decision is to be questioned here. The present case is a much stronger one than that. That was a mere selection amongst the children; this is a conveyance affecting the whole estate;—that was a case under the Bankrupt Act; this is to be treated as a conveyance to a stranger in fee. The whole strength of the argument on the other side is, that this appointment is not in derogation of the grant to the provisional assignee, because it is a conveyance to trustees for the benefit of the creditors; and therefore it is said that the power is well executed. [Lord *Abinger*, C. B.—The question whether the power is destroyed by the first conveyance, cannot depend on how it is exercised afterwards.] Lord *Langdale* took the same view in *Hole v. Escott*. There A., by marriage settlement, had conveyed his real estate to trustees in fee, to the use of himself for life, with remainder to the same trustees to preserve contingent

(a) 2 Keen, 444.

uses; and after his death to other trustees for a term of years, to secure a jointure to his wife, with remainder to the use of such children of the marriage as the husband and wife jointly, and in default of a joint appointment, the survivor of them, should appoint, with remainder, in default of any appointment, to all and every the children of the marriage living at the death of the survivor, as tenants in common, with remainder to the right heirs of A. A. became bankrupt before he had made any appointment; and it was held that the joint power was destroyed by the bankruptcy, and that a subsequent joint appointment by A. and his wife was invalid. Lord *Langdale* said (a):—“The estate for life in the husband, and the ultimate remainder in fee, were vested in the assignees by act of law, in this respect equivalent to a conveyance. If there had been a conveyance, the husband could not have derogated from his grant; and I am of opinion that he could not, by joining his wife, defeat the effect of the act of law to which his estate had become subject; and it appears to me, that his disqualification made it impossible that the joint power should be exercised.” That is a more direct authority in favour of the defendants than even the case of *Badham v. Mee*. The Court is bound to construe the deed executing the power as if it were inserted in the deed creating the power, with exception as to the time of executing it. In *Sugden on Powers* (b), it is said—“The estates created by the execution of a power, take effect precisely in the same manner (with the exceptions which will shortly be noticed) as if created by the deed which raised the power. Thus, suppose a general power of appointment to be given to a man by deed, and he by virtue of his power limit the estate to A. for life, with remainder to his children in strict settlement, these limitations will take effect as estates limited by the original deed, and in exactly the same way

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(a) 2 Keen, 465.

(b) P. 25.

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as they would have done had they been limited in that deed by the grantor of the power (a), in lieu of the power of appointment by force of which they were created." And it is stated that Lord *Hardwicke* admitted the principle, that where a person takes by execution of a power, whether realty or personalty, it is taken under the authority of the power, but *not from the time of the creation of the power*. "The meaning that the persons must take under the power, or as if their names had been inserted in the power, is, that they shall take in the same manner as if the power and instrument executing the power had been incorporated in one instrument; then they shall take as if all that was in the instrument executing had been expressed in that giving the power." We are therefore to consider the execution of this power of appointment, with the exception of the time, as if it had been exercised by the original deed. The intention of the donor was, that the donee should have the free exercise of the power; and the moment he did an act which deprived him of the whole control and power over the estate, which the donor intended he should possess, the power was destroyed." [*Parke, B.*—Your argument would go the length of saying, that if he let the estate from year to year, it would destroy the power.] If by his own act he has done anything which deprives him of the right to exercise the *full power*, it is thereby destroyed. By parting with his life estate and remainder in fee, the power was altogether gone. It has been decided that a power may be released: and when a party has parted with the whole of his interest, a mere naked power will not remain: *Bullock v. Thorne* (b). The donor never could have intended that he should execute the power when he had parted with all his right and interest in the property. [*Alderson, B.*—The case in *Moore* was that of a power appendant. *Parke, B.*—If he

(a) *Middleton v. Crofts*, 2 Atk. 661.

(b) *Moore*, 615.

conveyed the estate to a trustee, without any communication with his creditors, and he afterwards conveyed to a purchaser for value, that would not be a valid conveyance, since it would be in derogation of his former conveyance.] When the donee has parted with his whole estate and interest, the power cannot be exercised, in derogation of that grant. He could not execute it so as to operate merely on the estates tail. For these reasons, the judgment of the Court ought to be for the defendant.

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Sir *W. W. Follett*, in reply, relied on the principles stated in his former argument, and which had not been disputed, as decisive of the case. He observed that the words in the assignment under the Insolvent Act, were equivalent to the words *totum statum suum*, which had been held not to affect such a power: *Edwards v. Slater*. It was an assumption of the whole question to say that the appointment was in derogation of the previous grant, which was not an agreement or a contract, the voluntary act of the party, but an assignment under the provisions of an act of Parliament. If that were to destroy the power, it would be in derogation of the bargain contained in the settlement. In *Thorpe v. Goodall* (a), it was held that a bankrupt seised for life, with a general power of appointment, with remainder, in default of appointment, to the heirs of his body, could not be compelled by decree in equity to execute the power for his creditors. [Lord Abinger, C. B.—If you shew that the power is not destroyed by the first conveyance, then you have only to shew that it is properly exercised in the second. *Alderson*, B.—The latter can only be void to the extent to which it is in derogation of the former grant.] *Bullock v. Thorne* belongs to the same class as the other cases cited: there the execution of the power was in derogation of a former

(a) 17 Ves. 338, 460.

Bank. of Plum,
1838.

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grant. It has been said that we are to construe the deed executing the power as if it were inserted in the original deed; but that is not so. If it were to be taken as if inserted in the original deed, what would become of the covenants?—He cited also *Webb v. Russell* (a), and *Isherwood v. Oldknow* (b).

Cur. adv. vult.

The judgment of the Court was afterwards delivered by

ALDERSON, B.—In this case we propose to give the reasons which have induced us to send our certificate to the Lord Chancellor in favour of the plaintiffs.

By the original conveyance, dated the 27th and 28th of December, 1819, certain lands were settled to such uses as William T. Davies, and Frances his wife, should at any time or times, and from time to time, during their joint lives, by deed or other instrument in writing duly executed, direct and appoint, and in default of and until such appointment, to the use of William T. Davies for life, with remainder to trustees to preserve contingent remainders, then to the use of his wife for life, then in like manner to the use of his sons in succession in tail general, and then to the use of the daughters in tail general, with cross remainders, and with remainder in fee to William T. Davies himself.

In 1824 William T. Davies took the benefit of the Insolvent Act, and conveyed to the provisional assignee, on the 6th of August, 1824, all his interest in the premises, which was subsequently transferred by the provisional assignee to Isaac Jones, the assignee of the estate, in the usual way.

Under these circumstances, William T. Davies and his wife, in execution of their joint power of appointment,

(a) 3 T. R. 393.

(b) 3 M. & Selw. 382.

conveyed, on the 16th and 17th of September, 1828, by lease and release, the premises to Patrick Brown and Jenkyn Beynon in fee, upon trust for the creditors of W. T. Davies. And the point to be considered is, whether by this appointment any estate passed, and what estate, to the trustees.

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The first question is, whether the power was revoked by the conveyance to the provisional assignee; and we are of opinion that it was not. Indeed, on this part of the case there seems to be little difficulty.

No authority was cited for the proposition contended for by the defendant's counsel, that where by previous conveyance a party has prevented himself from executing a power as fully as he could have originally executed it, the power is at an end; nor can any such proposition be maintained. Even upon the authority of the decision of *Badham v. Mee*, as explained by Sir John Leach, this question may be answered in the negative. For he considered the power as not well executed in that case, because the particular limitations made by the appointment under it could not have been valid, if introduced into the original deed creating the power. But if the previous conveyance had altogether put an end to the power, such reasons would have been wholly unnecessary.

Now it is obvious, as was indeed pointed out by the Court in the course of the argument, that limitations might have been made subsequently to the conveyance in 1824, which would apply to the life estate of the wife, and the estates tail of the children, and which might legally have been introduced into the original deed, and consequently, upon the principles stated in *Badham v. Mee*, such an execution of the power would have been valid; and if any valid execution of the power could have been made, the first of the Lord Chancellor's questions must be answered in the negative.

But in truth, the whole case turns upon the answer to

Bill of Pleas,
1838.

Seal
of
Wm. Wood.

be given to the second question. For if the execution of this power by the deed of September, 1828, be invalid, then no estate passed by it, and the original limitations contained in the deed of 1819 remain still in force. We think, after full consideration, that this power was well executed, so as to convey the estate for life of the wife, and the estates tail of the children, to the trustees under the deed of 1828.

We cannot adopt the principle laid down by Sir John Leach, in affirming the certificate sent by the Court of Common Pleas in *Badham v. Mee*. It is not clear that such was the ground on which that Court made their certificate, the reasons for which were not given by them.

We do not think that it is right to translate into words the effect of the appointment under the power, taken in conjunction with the other circumstances, and then to consider whether such limitations could, according to the peculiar rules affecting the transmission of landed property, have been legally inserted in the original deed. The utmost extent to which the principle could be carried (and looking at the principles which govern the execution of these powers, which were originally mere modifications of equitable uses, taking effect as directions to trustees, which bound their conscience, and which a court of equity would compel them to perform, it may be questionable whether even this ought to be done,) would be to insert the limitations actually contained in the appointment itself in the original deed, and then to examine whether such limitations would be repugnant to any known rule of law. Now, if we do that in this case, no difficulty would be produced. Here, if the limitation of the estate made by the appointment under this power had been inserted in the original deed, there would have been no incongruity upon the face of that instrument. A fee would have been given to Brown and Beynon, the trustees, and no more. But then, in considering what operation such a deed, good

in point of form, will have, the Court looks at the other circumstances; and finding that the insolvent had, previously, by an innocent conveyance (for such the assignment under the Insolvent Act must, we think, be considered to be,) conveyed away his life estate and his remainder in fee, it adjudges that he cannot, by executing the power, derogate from his own previous conveyance, and concludes therefore that the deed does not operate on the estates previously assigned.

Book of Ricks,
1868.
JONES
v.
WATSON.

The result therefore is, that by executing the power, the insolvent conveys to the trustees all that had not been previously assigned under the Insolvent Act to his assignees. In conformity with this opinion we shall send our certificate to the Lord Chancellor.

A certificate was sent accordingly.

IN THE EXCHEQUER CHAMBER.

(In Error from the Court of Exchequer.)

MUSPRATT v. GREGORY.

A WRIT of error having been brought on the judgment of the Court of Exchequer in this case (a), it was argued in last Easter and Michaelmas Vacations, by *Crompton* for the plaintiff, and *W. H. Watson* for the

Salt was manufactured and publicly sold at certain salt works, and carried away in boats of the purchasers,

which came for the purpose of being loaded with it into a cut or canal on the premises, communicating with a public navigation. The boat of the plaintiff, an alkali manufacturer, was lying in this cut or canal for the purpose of receiving and carrying away salt bought by him for the purposes of his manufacture:—*Held*, on error, that the boat was not privileged from distress for arrears of an annuity issuing out of the land on which the salt works were erected, and granted by the manufacturer and seller of the salt.

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defendant. The arguments on the main point in the case, viz. whether, under the circumstances, the boat of the plaintiff was privileged from distress for rent arrear generally, were substantially the same as those in the Court below, and it is therefore unnecessary to repeat them. On the other point, viz. whether the plaintiff's boat was distrainable for arrears of a *rent charge* granted by the tenant of the salt works, the following authorities were cited for the plaintiff:—Com. Dig. Distress, (B) 2; Gilbert on Distresses, p. 41; *Kemp v. Cruwes* (a); 2 Saund. 290, n. 7. For the defendant, *Saffery v. Elgood* (b) was again relied upon. But as the Court, in giving judgment, did not advert to this point, it is not considered necessary to state the arguments upon it in detail.

Cur. adv. vult.

The judgment of the Court was now (May 8th) delivered by

Lord DENMAN, C. J.—We are of opinion that the judgment of the Court of Exchequer in this case ought to be affirmed.

The rule is admitted to be general, that all moveable chattels found upon the land chargeable with a distress, are *primâ facie* liable to be distrained. To this rule certain exceptions have been established, some for the benefit of trade or husbandry, and some for the preservation of the peace. And the question now is, whether the present case falls within any of those exceptions; for if not, the general rule must prevail.

It is admitted that there is no decided case which is expressly in favour of the privilege claimed; and on the other hand, that there is none expressly against it. Any minute examination, therefore, of the various cases which have

(a) 2 Lutw. 1580.

(b) 1 Ad. & E. 191; 3 Nev. & M. 346.

been cited, would be an unprofitable occupation. But taking the above admission made in the Court below to be correct, the burthen is cast upon the plaintiff of shewing that the exemption for which he contends is by fair analogy comprehended within some class of circumstances to which the exemption contended for has been conceded.

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It is said that the principle of exemption is the public good. But this is the principle upon which all laws are professedly formed. What is or is not for the public good is a matter of speculation, upon which the wisest men may differ, and upon which the Judges are not at liberty to promulgate any new rule of law.

That the particular exceptions specified in Co. Litt. and other books are put by way of example, is fully admitted. This very plainly appears from the use of the expression, "and the like;" consequently, when the examples specified do not strictly apply to any particular case, but the circumstances of it are ejusdem generis, the same privilege may be justly claimed.

We have, therefore, to inquire whether the circumstances of the present case are of the same sort or kind as any of those under which the exemption has been allowed.

Cases in which goods distrained are actually in the actual possession of the owner, and which are protected for the sake of public peace, may be laid out of the question.

In the cases of yarn carried to a beam to be weighed, and of a horse tied to a mill during the grinding of the corn brought there, the goods and the horse appear to have been spoken of as under the personal care of the owner, and may therefore be classed under the same head.

It may also be remarked, that the instance of the horse tied to the mill is not a real but a supposed case, and if the mill supposed to be alluded to be taken to have been

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an ancient mill, at which the party was bound to grind his corn, the privilege may stand on its own peculiar ground.

The acknowledged head of exemption which approaches nearest to the present case is the second of those specified by Lord Chief Justice Willes, in the case of *Simpson v. Hartopp* (a), viz. things delivered to a person exercising a public trade, to be carried, wrought, or managed in the way of his trade or business. Such are the cases of goods delivered to tradesmen, artificers, carriers, factors, wharfingers, auctioneers, carcase-butchers, and the like.

Now, admitting that the business of the salt works, carried on by the tenant of the land, was a public trade within the meaning of the second example mentioned by the Lord Chief Justice Willes, being open to the dealings of all persons indiscriminately, it is to be observed in the first place, that the plaintiff's boat was not delivered to the person exercising that business. It was never placed under his charge or in his custody, but was left by the owner, for his own convenience, in the place where it was distrained; nor was it brought or left there for the purpose of being taken care of, managed, or in any way dealt with, or, so far as appears, of being loaded, by the tenant of the land. The case, therefore, is not analogous to the example.

It is true that the boat was brought for the purpose of trade, and it was intended by the owner that it should be loaded with salt manufactured at the salt works of the tenant, with a view to enable the plaintiff to employ such salt in his manufacture of alkali: and it is very possible that the exemption of the boat from distress might be beneficial to the trade, both of the tenant, and of the plaintiff who trades with him; and, for anything that we

(a) Willes, 512.

know, such exemption might be conducive to the true interest of the landlord also. But we cannot, upon such grounds, take upon ourselves to say, in the absence of more direct authority, that the right of the landlord or other person entitled to distrain for rent is taken away.

Many other cases may be suggested in which such an exemption may be thought conducive to the public good, and to the interest of trade. If a lodger leave his furniture in a public lodging-house, or if a farmer, having brought malt to a brewer, leave his cart in the yard, intending to bring back grains or beer, when ready to be loaded, it might equally be contended that such things are exempt from distress. But we find no authority for holding that they are so. In the case of *Francis v. Wyatt* (a), the Court thought it much for the interest of the landlords themselves that carriages standing at livery should not be subject to distress for rent; yet when called upon for a decision, they did not hesitate to pronounce in favour of the distress, there being, as the report says, no shadow of a legal claim for exemption. In the notes to Saunders's Reports, Vol. 2, p. 289, b., Serjeant Williams says—"It seems that cattle belonging to a drover, being put into ground with the consent of the occupier, to graze only one night, in their way to a fair or market, would not at this day be held liable to the landlord's distress for rent;" though the contrary had been ruled in *Fowkes v. Joyce* (b). And in *Rede v. Burley* (c), it was said by two of the Judges (Beamont and Owen), though denied by *Walmsley*, that a horse which carrieth corn to a market, and is set up for a time in a private house, is not distrainable, because the purpose of bringing the horse was pro bono publico.

With respect to the first of these cases, the cattle may

(a) 3 Burr. 1498.

(b) 3 Lev. 260; 2 Vent. 50.

(c) Cro. Ellm. 550, 596.

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reasonably be considered as having continued in the possession of the drover; and, as to the second, that the horse was delivered into the care of the person at whose house he was set up. But supposing the cattle in the one case, and the horse in the other, to be privileged from distress on the sole ground of affording encouragement and protection to persons frequenting fairs and markets, we have no authority to extend that privilege, in derogation of a landlord's right, to mere customers resorting to the shop, warehouse, or manufactory of individuals. Being, therefore, unable to find any acknowledged class of exemptions under which the present case can be ranged, or to which it can, by fair analogy, be compared, we think that the privilege contended for ought not to be allowed, and that the judgment of the Court of Exchequer ought to be affirmed.

Judgment affirmed.

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AFFIDAVIT TO HOLD TO BAIL.

(1). *On Bill of Exchange.*

1. An affidavit of debt for principal and interest on a bill of exchange *drawn and accepted by* the defendant, and payable to the deponent at a day past, &c. :—*Held* sufficient. *Harrison v. Rigby*, 66

2. *Semble*, that in an affidavit to hold to bail, by the holder against the *drawer* of a bill of exchange, it is not sufficient to state in general terms that the acceptor made default in payment of the bill, but that such a default must be shewn as renders the drawer liable, viz. a refusal to pay on presentment.

If an affidavit of debt be good as to one distinct sum stated in it, and that be an arrestable amount, it is no objection that it is bad as to another sum stated in it, unless it appears that

process has issued on it for the whole amount, and not for the former sum only. *Counce v. Rigby*, 67

(2). *By Partners.*

Affidavit to hold to bail, for money lent by the plaintiff and "his late co-partners, C. & D.:"—*Held* insufficient, inasmuch as it did not shew that they were dead. *Morrall v. Parker*, 65

(3). *In Case.*

An affidavit in order to obtain a Judge's order to arrest a defendant in an action on the case, was made by the plaintiff's attorney, and stated that the defendant was tenant to the plaintiff of a shop and premises of the value of 80*l.* per annum ; that the defendant had commenced, on a day stated (13 days before), and since continued pulling down and destroying the upper part of the premises, and had already committed waste to the amount, *as the deponent was informed and believed*, of 63*l.* :—*Held* sufficient. *Hodgson v. Dowell*, 284

(4). *Waiver of Defect in.*

A defendant does not waive a defect in the affidavit to hold to bail,

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(4). *Waiver of Defect in.*

A defendant does not waive a defect in the affidavit to hold to bail,

by applying for particulars, or demanding a declaration. *Hodgson v. Dowell*, 284

(5). *Variance between it and declaration.*

Affidavit to hold to bail stated the defendant to be indebted on a promissory note, made by him, delivered to F., and indorsed by F. to the plaintiff. The declaration was on a note made by the defendant, delivered to F., indorsed by F. to E., and by E. to the plaintiff:—*Held*, not a material variance. *Luce v. Irwin*, 27

AGREEMENT.

What amounts to new Agreement.

Assumpsit.—The declaration alleged that the plaintiff was lawfully possessed of a house for the residue of a term of six years, and of certain goods, furniture, &c. therein, and that the plaintiff agreed to assign the lease of the house to the defendant at a certain price, and the furniture, &c. at a valuation, possession to be delivered on a certain day; and averred that she was, from the time of making the agreement, ready and willing to assign her interest in the house, and to deliver up possession of the goods at a fair appraisement. The defendant pleaded pleas traversing the readiness and willingness to assign the interest in the house, and to deliver up the furniture. It was proved at the trial, that the greater part of the house and furniture were destroyed by fire shortly after the agreement, and before the time for its completion.

The agreement provided that either party making default should pay to the other 500*l.* as liquidated damages. After the making of the agreement, but before the day for its completion arrived, the parties agreed, by an indorsement on the former

ARBITRATION.

agreement, to enlarge the time for its performance for a few days:—*Held*, that this amounted to a fresh agreement. But *quære* whether it ~~was~~ an agreement, the subject-matter whereof was of the value of 20*l.*, so as to require a fresh stamp. *Bacon v. Simpson*, 78

ANNUITY.

See DISTRESS.

PLEADING, V. (2).

APOTHECARIES' ACT.

Since the rules of H. T. 4 Will. 4, in an action brought by an apothecary, for work and labour as an apothecary, and for medicines, the plaintiff must either prove his certificate, or that he was in practice as an apothecary before the 5th of August, 1815, pursuant to 55 Geo. 3, c. 194, s. 21, although the defendant has only pleaded *nunquam indebitatus*. *Wagstaffe v. Sharpe*, 521

ARBITRATION.

See COSTS, II.

I. *Submission.*

When sufficiently mutual.

See Award, (1), 1.

II. *Award.*

(1). *When final and certain.*

1. By an order of reference, a cause was referred to an arbitrator, who was to settle all matters in difference between the parties at law and in equity, and to order and determine what he should think fit to be done by either party respecting the matters in dispute; so as he should make and publish his award by a day specified, (with power to enlarge the time for making it), ready to be delivered to the parties, or, if either of them should be dead, to their respective personal representatives. And the arbitrator was to be at liberty to make *one or more awards at his discretion*.

At the time of this submission, two equity suits were pending, in which the parties to the action were interested, and in which certain infants were also concerned; and there were also other matters in difference between them. Before any award was made, L., one of the parties to the equity suits, died.

The arbitrator made an award within the time limited by enlargement, whereby he ordered that a verdict should be entered for the plaintiff, damages 500*l.*, and that the defendants should pay that sum to the plaintiff, as well as the further sum of 350*l.*, for grievances not included in his declaration.

On motion to set aside a judgment and execution sued out on the award (the enlarged time having expired):—*Held*, first, that the award was sufficiently final, although it did not dispose of the equity suits; secondly, that it was not invalidated by the circumstance that infants were parties to those suits; thirdly, that the arbitrator's authority was not revoked by the death of L.; fourthly, that the award of the 350*l.* was sufficiently certain. *Wrightson v. Bywater*, 199

2. A cause and all matters in difference having been referred to arbitration, the arbitrator set out all the facts on the face of his award, and then awarded that the plaintiff had no cause of action against the defendant, and stated that he determined the action in favour of the defendant. He then, after awarding by whom the costs of the reference should be paid, concluded as follows:—"But if the Court shall be of opinion, upon the facts hereinbefore stated, that the plaintiff is entitled to recover in the action, then I determine the action in favour of the plaintiff, and order and award that the defendant pay damages to the plaintiff to the amount of one shilling, and also pay to the plaintiff

the costs of the reference:"—*Held* that, the arbitrator having come to a positive finding, and expressly declared his own opinion, the award was sufficiently final, and the latter clause might be rejected. *Barton v. Ranson*, 322

(2). *Attachment for non-performance of.*

By the terms of the submission, the arbitrator had power to enlarge the time for making his award: the order of reference, on which there was an indorsement enlarging the time, dated previously to the expiration of the time for making the award, was made a rule of court:—*Held*, that an attachment for non-performance of the award might be moved for without an affidavit that the enlargement was duly made. *Ibid.*

ATTACHMENT.

See ARBITRATION, II, (2).

COSTS, V.

(1). *When Sheriff liable to.*

Bail came up to justify at chambers on the 20th October, on which day the rule to bring in the body expired, but were rejected on account of a defect in the notice of justification. The Judge made an order for three days' further time to justify, "without prejudice to the sheriff's being in contempt;" and the bail justified within that period:—*Held*, that an attachment issued against the sheriff was irregular. *Regina v. The Sheriff of Middlesex, in a Cause of Dignam v. Reitter*, 64

(2). *Form of Affidavit to set it aside.*

The rule of the Exchequer, H. 7 Will. 4, (as to the form of the affidavit on motion to set aside a regular attachment or bail-bond), is an exact transcript of the rule of the King's

Bench, M. 59 Geo. 3. The report of the latter in 2 B. & Ald. 240, which is adopted into the books of practice, is erroneous, in reading "for his and their only indemnity." The words of the original rule are "for his and their indemnity only." *Regina v. Sheriff of Cheshire, in Goach v. Atkinson*, 605

ATTORNEY.

See COSTS, IV. (3).

MONEY HAD AND RECEIVED, 1.

I. *Delivery of Bill.*

An attorney need not deliver a signed bill for disbursements by him as attorney in a cause in respect of which he does not intend to make any charge to his client. *Sparrow v. Johns*, 600

II. *Taxation.*

Taxable Items.

Quære, whether a sum of money paid by an attorney on taking out a rule to discontinue, is a taxable item? *Ibid.*

III. *Liabilities of.*

For Witness's Expenses.

The attorney in a cause is not personally liable to a witness whom he subpoenas to give evidence in the cause, for his expenses of attendance. *Robins v. Bridge*, 114

BAIL.

See ATTACHMENT, 1.

BAILBOND.

When cancelled.

A defendant having been arrested on an affidavit of debt for money lent, afterwards, on an affidavit disclosing certain facts, obtained a Judge's order to arrest the plaintiff. The plaintiff applied to be discharged out of custody, and in his affidavit for that pur-

pose admitted certain facts which appeared to be inconsistent with his claim for money lent. Under these circumstances, the Court refused an application for cancelling the bail-bond given by the defendant. *Vaughan v. Goadby*, 143

BANKRUPTCY.

I. *Act of Bankruptcy.*

The act of bankruptcy consisted in J.'s having given directions, when in embarrassed circumstances, that he should be denied to all persons; but there was no proof that any person was in fact denied, nor that J. secreted himself. The jury found that the denial was with intent to delay his creditors. *Quære*, whether this was an act of bankruptcy. *Hare v. Waring*, 362

II. *What debts provable.*

Where, a sum of money being due from A. to B., C., by B.'s request, and for his accommodation, drew a bill of exchange on A. for the amount, which A. accepted, and C. then indorsed the bill and gave it to B., who indorsed and negotiated it;—B. having subsequently become bankrupt, *Held*, that the amount of the bill, which was dishonoured, and paid by C., was provable by him under the fiat, and therefore that his right of action against B. was barred by the certificate. *Haigh v. Jackson*, 598

III. *Mutual Credits.*

Assumpsit by assignees of one S., a bankrupt, for money had and received to the use of the assignees since the bankruptcy. *Plea*, that before the bankruptcy, and before notice of any act of bankruptcy, the defendant gave credit to the bankrupt to the amount of 50*l.*, by indorsing for his accommodation, and without consideration, a bill of exchange for that amount, drawn by

him, and payable to the bankrupt's order, and that such credit was of a nature extremely likely to end in a debt. The plea then alleged that the amount of the bill was paid by the defendant on its dishonour, after the bankruptcy, but before the commencement of the action, and the bankrupt thereupon became indebted to the defendant; that, before the bankruptcy, S. drew a bill of exchange on the Chesterfield Bank, and delivered it to the defendant, by way of loan, that he might raise the amount, and thereby gave credit to the defendant to that amount; and that afterwards, before the bankruptcy, the defendant obtained the amount of the said bill from the Chesterfield Bank, and that he was ready and willing to set off the two sums against each other. Replication, that the defendant did not give credit to S., and that S. did not give credit to the defendant, and that S. was not nor is indebted to the defendant *modo et formâ*.

Held, that the plea shewed such a giving of credit to the bankrupt within the statute 6 Geo. 4, c. 16, s. 50, as might be the subject of set-off in an action brought by his assignees.

Semble, that the replication was bad for duplicity, as putting in issue not only the *amount* of the credits, &c., but also the *nature* of the mutual claims. *Hulme v. Muggleston*, 30

IV. *Depositions, when conclusive Evidence.*

To assumpsit by assignees of a bankrupt, J., for the non-acceptance of shares in the Great Western Railway, which the bankrupt, before his bankruptcy, had contracted to sell to the defendant, and to convey to him on a day which was subsequent to the bankruptcy, the defendant pleaded that the act of bankruptcy on which

he was declared a bankrupt was unlawfully concerted between J. and the plaintiff, and that he committed no other act of bankruptcy. *Semble*, this was not a case in which the depositions were conclusive evidence of the matters contained in them, under the 6 Geo. 4, c. 16, s. 92, inasmuch as the bankrupt could not have fulfilled his contract on the day specified, and therefore this was not a debt or demand for which he could have sustained an action. But even if the case were within that section, *semble*, that evidence might be given to shew that the act of bankruptcy was concerted. *Hare v. Waring*, 362

BILLS AND NOTES.

I. *Notice of Dishonour.*

Where a party drew a bill, dating it generally "London," on an acceptor also resident in London, whose address was stated in the bill:—*Held*, that proof that a letter, containing notice of the dishonour of the bill, was put into the post-office, addressed to the drawer at "London," was evidence to go to the jury that he had due notice of dishonour. *Clarke v. Sharpe*, 166

II. *When discharged by giving Time.*

Assumpsit against the maker of a promissory note. Plea, that it was a joint and several note made by the defendant and T. S., and that the defendant entered into it at the request of T. S., and for his accommodation, and in order that he might get it discounted by the plaintiffs; that the defendant had no other value or consideration for making it, and that he made it as a mere surety for T. S., of which plaintiffs had notice; and that, although the note was due in the hands of the plaintiffs for six months, yet the defendant had no notice, till the commencement of this suit, of its non-payment by T. S.;

BILLS AND NOTES.

and that the plaintiffs gave time for payment to T. S., to the prejudice and without the knowledge or consent of the defendant:—*Held* bad on general demurrer. *Clarke v. Wilson*, 208

CERTIORARI.

See FOREIGN ATTACHMENT.

If the Judge of an inferior court of record receives a certiorari after the time limited by the 21 Jac. 1, c. 23, s. 2, a procedendo will issue. And that, although in the mean time the record has been filed in the Court above. *Laverack v. Bean*, 62

CLERGY.

To an action of assumpsit by the indorsees against the indorser of a bill of exchange, the defendant pleaded that the bill was made and indorsed after the passing of the stat. 57 Geo. 3, c. 99, which restrains spiritual persons from being occupied in any trade or dealing; that the plaintiffs were a banking company, of which certain spiritual persons holding benefices were partners and members; that the trade or business of a banker was carried on by the said co-partnership for gains and profits as well of those spiritual persons as others, contrary to the form of the statute; whereby the indorsement and the promise in the declaration mentioned were void in law:—*Held*, on demurrer, that the plea was good, and that the trade of a banker was within the meaning of the statute. *Hall v. Franklin*, 259

COGNOVIT.

See Costs, IV., (2).

COMMITMENT.

Under 11 Geo. 2, c. 19, s. 4.

A warrant of commitment under the 11 Geo. 2, c. 19, s. 4, did not

CONTRACT.

state that there had been a complaint in writing to the justices, or that the examination of witnesses was upon oath; but it referred to the order of the justices (for payment of double the value of the goods removed), in which those matters were stated:—*Held*, sufficient, and that the justices were not liable in trespass. *Coster v. Wilson*, 411

CONTRACT.

I. Construction of.

The plaintiffs, on the 19th April, 1836, entered into a written contract to build, for the sum of 1700*l.*, a brewery for the defendants, so far as regarded the carpenters' work, within the space of four months and a half next ensuing the date of the agreement; and, in default of completing the same within the time therein-before limited, to forfeit to the defendants 40*l.* per week for each week that the completion of the work should be delayed beyond the 31st August, the amount to be deducted from the said sum of 1700*l.*, as liquidated damages. The plaintiffs did not begin the work for four weeks after the date of the agreement, in consequence of the defendants not being able to give them possession; they were afterwards delayed one week by the default of their own workmen, and four weeks by the default of the masons, &c., employed by the defendants; and the work was not completed till five weeks after the time limited:—*Held*, that the defendants were not entitled to deduct from the 1700*l.* any sum in respect of the delay, either for the one or the four weeks. *Holme v. Guppy*, 387

II. Admissibility of Parol Evidence to apply Written Contract.

A., the proprietor of a lead mine called the Bog Mine, situate near Shrewsbury, sold to B., a lead-mer-

chant in London, by a written contract, "two hundred tons of Bog Mine lead, at 22l. per ton, deliverable in the river Thames." The broker who made the contract stated at the time, in answer to a question by B., that the lead was *ready for shipment*. A few days afterwards B. applied to the broker, to know whether A. would agree to allow the freight or insurance from Gloucester or Liverpool, to which A. agreed; but B. subsequently required the lead to be delivered in London. It appeared that Gloucester and Liverpool were the usual ports of shipment for London; but the Bog Mine lead was first brought by barges down the Severn from Shrewsbury to Gloucester. The lead was delayed a considerable time in this part of its transit by the lowness of the water, and when it arrived in London, B. refused to receive it, the price having fallen considerably. In an action by A. against B. for not accepting the lead, B. pleaded that the plaintiff was not ready to deliver it within a reasonable time, on which issue was joined. The broker stated (in addition to the above facts) that he had understood from A. that the lead was at Shrewsbury. The learned Judge stated to the jury, that it might be taken for granted that the understanding of the parties was, that the lead was ready for shipment at Gloucester or Liverpool; that this was confirmed by the defendant's application as to the freight and insurance; and if they thought it ought to have arrived in a shorter time, if ready for shipment at Gloucester or Liverpool, the defendant was entitled to a verdict:—*Held*, that the parol representation of the broker, that the lead was ready for shipment, was admissible in evidence, not to vary the written contract, but as one of the data from which the reasonableness of the time was to be determined.—

Held, also, that the direction of the learned Judge was warranted by the evidence. *Ellis v. Thompson*, 445

III. *Illegal Contract.*

Because made on Sunday.

To a count for goods sold and delivered, the defendant pleaded that they were goods sold and delivered to him by the plaintiff in the way of his trade, on a Sunday, contrary to the statute. The plaintiff replied, that the defendant, after the sale and delivery of the goods, kept them for his own use, without returning or offering to return them, and had thereby become liable to pay the sum mentioned in the plea, being so much as they were reasonably worth:—*Held* bad on demurrer. *Simpson v. Nicholls*, 240

COSTS.

I. *In Trespass.*

1. Trespass for assaulting the plaintiff, *seizing and laying hold of him*, and imprisoning him. The defendant having pleaded not guilty, and a justification under a writ of *capias*, the plaintiff at the trial recovered a farthing damages:—*Held*, that the Judge could not certify under the statute 43 Eliz. c. 6, to deprive the plaintiff of costs, for that a *battery* was admitted on the record. *Rawlings v. Till*, 28

2. To a declaration in trespass *qu. cl. fregit*, a plea denying the *clome* to be the plaintiff's is a denial of possession, if the defendant was a *wrong-doer*; if otherwise, of the right to the possession; but, on either supposition, it is a denial of *title*, as even possession is title against a wrong-doer; and therefore such a plea raises a question of title in the action, and prevents the Judge from certifying to deprive the plaintiff of costs, under 43 Eliz. c. 6.

Although upon *some* of the issues in trespass qu. cl. fregit the freehold or title may come in question, yet, if one special plea, which excludes all question of title, is found against the defendant, the plaintiff is entitled to full costs. *Purnell v. Young*, 288

3. Trespass for breaking and entering the plaintiff's house, and assaulting the plaintiff. Pleas, 1. not guilty; 2. that the dwelling-house in which, &c., was not the dwelling-house of the plaintiff; and issues thereon. Verdict for the plaintiff, damages one farthing:—*Held*, that the plaintiff was entitled to full costs, without a certificate under the stat. 22 & 23 Car. 2, c. 9, s. 136. *Pugh v. Roberts*, 458

4. Trespass for breaking and entering the plaintiff's house and distraining his goods. Plea, as to the breaking and entering, leave and licence; as to the residue of the declaration, not guilty. Verdict for the plaintiff, damages 6d.:—*Held*, that the Judge might certify under the 43 Eliz. c. 6, to deprive the plaintiff of costs. *Mills v. Stephens*, 460

5. In an action for false imprisonment, the plaintiff will be entitled to full costs, although he only recovers a farthing damages, unless the Judge certifies under the statute of Elizabeth to deprive him of costs; and a certificate under 22 & 23 Car. 2, c. 9, is not necessary. *Gould v. Drake*, 543

II. On recovering under 20l.

A cause was referred to arbitration, and by the order of reference, the party in whose favour the award should be made was to be at liberty to enter up judgment for the sum awarded, as if a verdict had been obtained. The arbitrator awarded a sum under 20l.:—*Held*, that the costs must be taxed according to the reduced scale directed by the "Direc-

tions to Taxing Officers," H. T. 4 Will. 4. *Wallen v. Smith*, 138

III. After Summons to stay Proceedings on Payment of a certain Sum.

Where the defendant takes out a summons to stay proceedings on payment of a certain sum, which the plaintiff refuses, alleging more to be due; and the defendant does not afterwards bring the money into Court; the plaintiff will not therefore be liable to the costs subsequently to the summons. *Gover v. Elkins*, 216

IV. Taxation.

(1). Delivery of Bill.

1. A judgment on demurrer is not a rule, order, *town postea*, or *inquisition*, within the rule of the Exchequer, Mich. Term, 1 Will. 4, s. 10, which requires the delivery of a copy of the bill of costs before taxation.

An omission to comply with the rule is no ground for setting aside the judgment and execution, but only for a review of the taxation. *Taylor v. Murray*, 141

2. Where the defendant does not appear, but an appearance is entered for him according to the statute, it is not necessary to deliver a copy of the bill of costs before taxation, notwithstanding the rule of this Court, M. T. 1 Will. 4, s. 10. *Burch v. Pointer*, 310

(2). On Cognovit.

The defendant gave a cognovit, whereby it was stipulated that no judgment should be entered up thereon, unless default should be made in payment of the debt, with interest, and costs, on the 9th November: and in case the defendant made default in payment as aforesaid, the plaintiff was to be at liberty to enter up judgment and proceed to execution, and take the whole of the said debt and costs, together with the costs of such judg-

ment and execution:—Held, that no default could be made by the defendant until the plaintiff had furnished her with a bill of the costs, and given her notice of taxation; and not having done so, that judgment signed on the 10th November was irregular, although the defendant had paid no part of either the debt or costs.
Booth v. Lady Hyde Parker, 54

(3). *Costs of Taxation.*

Where, upon taxation of costs under 2 Geo. 2, c. 23, s. 23, a *less* sum than one-sixth of the bill is taken off on taxation, the plaintiff's attorney will not be entitled to the costs of taxation, if he has wilfully inserted any item of charge which he must know ought not to have been charged.
Holderness v. Barkworth, 341

V. Attachment for.

What sufficient Demand.

An attachment for non-payment of costs cannot be supported by a demand of the costs by a third person, authorised by the attorney to receive them. *Clark v. Dignam*, 319

COURTS OF REQUESTS.

1. The Bath Court of Requests has not jurisdiction over a claim made by a voter against an objection for compensation for loss of time in attending the Revising Barrister's Court on a notice of objection. *Roberts v. Humby*, 120

2. The Blackheath Court of Requests Act, 6 & 7 Will. 4, c. cxx. s. 22, excepts out of the jurisdiction of the Court any debt "for any sum being the balance of an account originally exceeding the sum of 5*l.*:"—*Held*, that this exception did not apply to an account containing items amounting to upwards of 5*l.*, and reduced by payments from time to time below that sum, where it appeared

that at no one time so much as 5*l.* was due. *Pope v. Banyard*. 424

DEED.

See EVIDENCE.

RELEASE, 1.

Effect of General Words.

V., the lessee of a mill and premises at a rack-rent, being in insolvent circumstances, executed an assignment, whereby, after reciting his insolvency, and that he had agreed to assign "all his debts, personal estate, and effects of every description, to C. & B., in trust for the benefit of his creditors," he conveyed and assigned to the said C. & B. all and singular the stock in trade, implements and utensils in trade, corn, grain, hay, horses, carts, and carriages, *crops of every kind, as well severed as not*, and personal estate whatsoever of him the said V., *in, upon, or about* the said mill and premises now in his use or occupation, or elsewhere, &c., (except the wearing apparel of himself and family); and also all debts, securities, writings, &c., *and all other the personal estate and effects of him the said V., whatsoever and wheresoever*, or in or to which he is anywise interested or entitled: habendum, in trust out of the proceeds, first, to pay the costs of the assignment, &c.; secondly, to pay the rent due and in arrear for the said mill and premises, or accruing due until and at and up to the 6th of April then next; and, thirdly, to distribute the residue for the benefit of his creditors:—*Held*, that the words of the assignment were large enough to comprehend the lease of the mill; and the jury having found that the assignees had accepted the lease, that it passed to them under the assignment. *Ringer v. Cann*, 343

DISTRESS.

Boats of Stranger, when privileged.

Salt was manufactured and publicly sold at certain salt works, and carried away in boats of the purchaser which came for the purpose of being loaded with it into a cut or canal on the premises, communicating with a public navigation. The boat of the plaintiff, an alkali manufacturer, was lying in this cut or canal for the purpose of receiving and carrying away salt bought by him for the purposes of his manufacture:—*Held*, on error, that the boat was not privileged from distress for arrears of an annuity issuing out of the land on which the salt works were erected, and granted by the manufacturer and seller of the salt. *Muspratt v. Gregory*, 677

EASEMENT.

If a party builds a house on his own land, which has previously been excavated to its extremity for mining purposes, he does not acquire a right to support for the house from the adjoining land of another, at least until twenty years have elapsed since the house first stood on excavated land, and was in part supported by the adjoining land, so that a grant by the owner of the adjoining land, of such right to support, may be inferred; for rights of this sort can have their origin only in grant.

And *semble*, such grant ought not to be inferred until after the lapse of twenty years since the owner of the adjoining land knew or had the means of knowing that the land had been so excavated.

Therefore, the owner of the adjoining land is not liable to an action on the case, if, within such period, he works mines under his own land so near its boundary as to cause the excavated land on which the house stands to sink, and the house to be

EJECTMENT.

thereby injured. *Partridge v. Scott*, 620

EJECTMENT.

See PLEADING, II. (1).

I. By Tenant in common.

Ejectment by one tenant in common against his three co-tenants in common, and the D. & S. Railway Company, to whom the other three defendants had demised the premises in question. The three co-tenants in common defended as landlords, and the company as tenants. The usual special order had been obtained, admitting the landlords to defend, and to admit ouster in case actual ouster should be proved. It was proved on the trial that rent had formerly been paid to all the tenants in common by certain other persons; and there was no evidence to shew that any notice to quit had been given, or that that tenancy had been otherwise determined:—*Held*, that the Railway Company, who defended as tenants, were not precluded, by the order admitting the landlords to defend, from insisting that the former tenancy still existed, and therefore that the legal title was not in the lessor of the plaintiff on the day of the demise.

The premises in question (consisting of houses) had been pulled down by the Railway Company, and the rail-road constructed on the site of them. *Semble*, that this was such an occupation as amounted to an actual ouster. *Doe d. Wann v. Horn*, 333

II. Service.

(1). Where Premises are unoccupied.

Where there were four tenants, lessees of four adjoining houses, three of whom were personally served with a declaration in ejectment, but the fourth having left the premises unoccupied, the declaration was affixed to the door of his house—the Court

EJECTMENT.

granted a rule nisi for judgment against the casual ejector, to be served in the same way as the declaration, and afterwards made the rule absolute on an affidavit of such service. *Doe d. Hindle v. Roe*, 279

EVIDENCE.

Of Deed thirty years old.

T. W. occupied land under one W., who was lessee for lives, and paid the rent reserved by the lease. The day after the lease expired, T. W. went and obtained the lease from W. and J., who claimed no interest in it, and delivered it up to the lessor, from whom he took a fresh demise of the land. The lease was produced from the custody of the lessor at the trial:—*Held*, that it came from the proper custody. *Rees v. Walters*, 527

EXCISE ACTS.

See MONEY HAD AND RECEIVED, 3.

EXECUTOR AND ADMINISTRATOR.

1. *Assets, what are.*

A. had commenced a suit in Chancery for an account under a will, in which she employed as her solicitors, first, B., then C., who successively gave up the suit, and then D., who continued to conduct it till her death in 1829. After her death, E., her executor, filed a bill of revivor, and D. continued to conduct the suit for him. In 1833, a decree was made, whereby it was ordered that the Master should settle the costs of all the parties, and that the same, when taxed and settled, should be paid out of the fund in the following manner: viz., the plaintiff's costs (consisting of the costs both of A. and E.) to D., his solicitor, and the costs of the defendants to their several solicitors. The plaintiff's costs were taxed, and certain sums in respect of them were

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paid to D. C. sued E., as executor of A., for the amount of his bill, and had judgment of assets quando acciderent. He afterwards brought another action on the judgment, and had given notice of trial; and it was then agreed between them, that, on C.'s withdrawing the record, E. would then pay him 100*l.* on account of his bill, and the remainder out of the assets which should first come to his hands as executor of A.; and the record was accordingly withdrawn. A further sum was afterwards paid out of the Court of Chancery to D. in respect of the same costs:—*Held* (by Parke and Alderson, Bs., Lord Abinger, C. B., dissentiente), that this sum was assets in the hands of E., within the meaning of the agreement. *Smedley v. Philpot*, 573

2. *Actions against.*

Counts for goods sold to and work and labour done for the defendant, as executor, cannot be joined with a count for money found to be due on an account stated with the defendant as executor.

Where work is contracted for by a testator, who dies before the contract is completed, but it is completed afterwards, *semble*, that in an action against his executor, the plaintiff should declare specially, stating those facts. *Corner v. Shew*, 360

FIXTURES.

A lessee cannot, even during his term, maintain trover for fixtures attached to the freehold. *Mackintosh v. Trotter*, 184

FOREIGN ATTACHMENT.

W. sued out of the Tolsey Court of Bristol a writ of foreign attachment against C., and seized goods of his under it. The writ was returned on the 14th February. On the 17th

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B. filed a claim of property, alleging the goods to be his, and praying a return of them. To this W., on the 10th April, replied, alleging that the property was in C., and not in B., concluding to the country; and added the similitur. On the 11th May, the suit was entered in the issue book for trial, and it came on for trial on the 12th July, when B. tendered a certiorari, sued out ex parte in the ordinary way, in this Court, to remove the suit then pending in the Tolzey Court "under the title of W. plaintiff, C. defendant, and B. claimant:"—*Held*, on motion for an attachment against the Judge of the Tolzey Court for refusing to receive this certiorari, that B. was not entitled to sue it out, under the stat. 21 Jac. 1, c. 23, s. 2. *Bruce v. Wait*, 21

FRAUDS, (STATUTE OF.)

See RAILWAY SHARES, 1.

Acceptance of Goods within.

Where a joint order is given for several classes of goods, the acceptance of one class is a part acceptance of the whole, within s. 17 of the Statute of Frauds.

Semble, that, if the purchaser of goods has used (in the opinion of the jury) more of them than was necessary for experiments, that does not amount to an acceptance within the statute.

Agreed, that the defence that there was no sufficient contract to satisfy the Statute of Frauds, may be taken under the general issue. *Elliott v. Thomas*, 170

GAMING.

Money lent for the purpose of gaming, and of playing with at an illegal game, such as hazard, cannot be recovered back. *M'Kinnell v. Robinson*, 434

INSOLVENT ACT.

GOODS SOLD AND DELIVERED.

See INTEREST.

HUSBAND AND WIFE.

See INSURANCE, I.

MONEY HAD AND RECEIVED, 2.

1. *Discharge of Wife from Arrest.*

A married woman will be discharged from arrest on entering a common appearance, unless the plaintiff swears that when he gave her credit, she represented herself to be a feme sole. *Hollingdale v. Lloyd*, 416

2. *Liability of Husband on Contracts of Wife.*

Where a husband, living apart from his wife, allows her sufficient for her maintenance, he is not liable for her necessaries supplied to her, and notice to the tradesmen of that allowance is immaterial, and need not be given. *Mizen v. Pick*, 481

INNKEEPER.

An innkeeper cannot detain the person of his guest, or take off his clothes, in order to secure payment of his bill. *Sunbolf v. Alford*, 248

INSOLVENT ACT.

1. *What Rights vest in Assignees.*

Assignees of a bankrupt or an insolvent debtor take only such property as he was equitably as well as legally entitled to at the time of the bankruptcy or assignment.

Therefore, if A. agree to assign to B. certain specific goods, by way of security for money advanced by B. for the purchase of them; and afterwards, in pursuance of such agreement, actually assign them; although the assignment itself be under such circumstances as would have rendered

it void under the Insolvent Debtors' Act, and A. subsequently takes the benefit of that act, his assignees are not entitled to such goods.

Secus, if the agreement related to such goods as A. might have at the time of the execution of the assignment, their corpus not being ascertained at the time of the agreement. *Mogg v. Baker*, 195

2. *Notice to Creditors by Insolvent.*

To an action of indebitatus assumpsit in 100*l.* for goods sold and delivered, &c., the defendant pleaded his discharge from the cause of action under the Insolvent Act; to which the plaintiff replied, that although he, the plaintiff, was named and inserted by the defendant in his schedule, yet he had not any notice of the filing of the petition, or of the time appointed for the hearing upon it:—*Held*, on demurrer, that the replication was bad, as it did not allege that the plaintiff was a creditor to the amount of 5*l.*, so as to be entitled to notice under the 42d section of the 7 Geo. 4, c. 57. *Troup v. Boff*, 615

INSURANCE.

I. *On Life.*

(1). *Concealment of Material Facts.*

In an action on a policy of insurance effected by the plaintiff on the life of his wife, the declaration averred that the plaintiff had made statements, (inter alia), that the wife was not afflicted with any disorder which tended to shorten life, and that she had led, and continued to lead, a temperate life. The defendant pleaded, that before the making of the policy, and on divers times after that day, the wife had been and was afflicted with certain disorders, maladies, or diseases, to wit, delirium tremens and erysipelatous inflammation of the legs, *all which the plaintiff before and at the*

time of the making of the policy well knew. It appeared that at the time the policy was effected, the wife had been examined at the insurance office, and answered several questions put to her, but did not apprise the company of her having been affected with those complaints. The jury found that the plaintiff had not any knowledge of her having had these disorders:—*Held*, that upon the issue raised on these pleadings, the wife not being the general agent of the husband to effect the policy, but only sent to answer particular questions, her knowledge was not in this respect the knowledge of the husband.

The wife had for several years been attended by A. B. up to her marriage with the plaintiff, and nearly to the time when the policy was effected. After her marriage, C. D., the medical attendant of her husband's family, had, on one or two occasions, when called in to the other members of the family, prescribed for her for a cold or some trifling matter. In answer to the question put to her at the office, "Who is your usual medical attendant?" she replied, C. D.:—*Held*, that the learned Judge ought not to have left it to the jury, on this evidence, to say which of the two was her usual medical attendant, but whether C. D. could be called her usual medical attendant at all. *Huckman v. Fernie*, 505

II. *Marine.*

(1). *Deviation.*

Assumpsit on a policy of insurance on the goods of a vessel called the Clipper, at and from Liverpool to any port or ports, place or places of loading and trade on the Coast of Africa and African Islands, during her stay and trade on the said coast and islands, and at and from thence to her port or ports of discharging in the United Kingdom, with leave to call at all

ports and places backwards and forwards, and forwards and backwards, *without being deemed any deviation*; with liberty for the said ship in that voyage to proceed and sail to and stay at any ports or places whatsoever, and with leave to load, unload, &c., goods wheresoever she might proceed to, with any ships, boats, &c., in loading and unloading included, *particularly with liberty to tranship* on board any vessel or craft in the same employ; with an agreement that the vessel might be employed or used as a *tender* to any other vessel or ship in the same employ. The vessel arrived at Benin, in Africa, and stayed there thirteen months, during which time she was employed in conveying goods from a vessel in the same employ at the mouth of the river, to Camaroones, and putting them on board another vessel also in the same employ; but on her return with a homeward cargo was lost:—*Held*, that the learned Judge who tried the cause was right in telling the jury that the voyage to the Camaroones was a deviation, and that it was not an acting as a tender within the meaning of the policy:—*Held*, also, that it was a proper question for the jury, whether her stay at Benin was unreasonable or no; and they having found in the affirmative, that it was warranted by the evidence. *Hamilton v. Sheddon*, 49

(2). Consolidation of Actions.

Where two actions were brought by the same plaintiffs against different defendants, on different policies of insurance on the same ship, the Court refused to consolidate them at the instance of the defendants, without the consent of the plaintiffs. *M^rGregor v. Horsfall*; *Same v. Smith*, 320

INTEREST.

When recoverable.

Where goods are sold and delivered,

LANDLORD AND TENANT.

to be paid for by a bill at a certain date, if the bill be not given, interest on the price, from the time when the bill would have become due, may be recovered as part of the estimated value of the goods, on the common count for goods sold and delivered. *Farr v. Ward*, 25

INTEREST IN LAND.

See RAILWAY SHARES, 1.

INTERPLEADER ACT.

The sheriff is not entitled to relief under the Interpleader Act, where, having gone to the premises of the defendant to take his goods under a *fi. fa.*, he has withdrawn without seizing them, on notice of an adverse claim, and has not the goods in his possession when he applies to the Court. *Holton v. Guntrip*, 145

JUSTICES.

See COMMITMENT.

LANDLORD AND TENANT, 3.
TRESPASS, 1.

LANDLORD AND TENANT.

1. *Payment of Rates by Tenant.*

By a memorandum of agreement, certain marsh lands were demised by the plaintiff to the defendant, subject to a condition that the defendant should pay all outgoings whatsoever, rates, taxes, *scots*, &c., whether parochial or parliamentary, which then were or should be thereafter charged or chargeable upon or on account of the said marsh lands (the then present land-tax only excepted):—*Held*, that an extraordinary assessment made by Commissioners of Sewers upon the lands, for a work of permanent benefit to the land, was within the meaning of the agreement.

The assessment was made in certain proportions upon the owners and

occupiers. For four years the defendant (the tenant) paid, in the first instance, both his own share and that of the plaintiff (his landlord), and upon each half-year's settlement of accounts for rent due, with the plaintiff's agent, who was ignorant of the agreement, the sum so paid was allowed towards the rent, and receipts were given for the balance:—*Held*, in an action brought upon the agreement, to recover the sums so allowed as arrears of rent, that the facts supported a plea of payment. *Waller v. Andrews*, 312

2. Surrender.

A tenant from year to year, believing that his tenancy determined at Midsummer, gave a written notice to quit at that period, which the landlord accepted, and made no objection to. The tenant having afterwards discovered that his tenancy expired at Christmas, gave his landlord another notice accordingly, and, on possession being demanded at Midsummer, refused to quit the premises. An ejectment having been brought:—*Held*, that the tenancy was not determined by notice, inasmuch as it was not good as a notice to quit, and could not operate as a surrender by note in writing within the Statute of Frauds, being to take effect in futuro. *Doe d. Murrell v. Milnard*, 328

3. Jurisdiction of Justices under 11 Geo. 2, c. 19, s. 4.

Justices of the Peace have jurisdiction, under the 11 Geo. 2, c. 19, s. 4, to inquire into and adjudicate on an information for the alleged fraudulent removal of goods by a tenant, although it appears that the property in the premises is disputed, and that the tenant has paid the rent to one of the claimants. *Coster v. Wilson*, 411

LEGACY DUTIES.

1. The pendency of a suit in equity, at the instance of a legatee, praying that an account may be taken of the personal estate and effects of a testator received by the executors, and that the personal estate may be administered, and his legacy paid, is no answer to an application by the commissioners of stamps under the 48 Geo. 3, c. 99, if any duties have become payable on legacies which have been paid, notwithstanding the 36 Geo. 3, c. 52, which provides that the Court in which such suit shall be instituted shall, in giving directions concerning the payment of legacies, take care that no allowance shall be made in respect of any legacy, &c., without due proof of the payment of the duties thereby imposed.

It is the duty of an executor to deduct the amount of legacy duty on payment of the legacy; and if he omit to do so, he will become personally responsible for it. *In re Sammon*, 881

2. A testator devised real estates to W. T. for life, with remainder to his first and other sons in tail, with remainder to T. P. for life, remainder to his first and other sons in tail, remainder to G. P. for life, with remainders over; and gave a power to the several persons who, by virtue of the limitations in the will, should be in actual possession of the estates, by deed or will to appoint any woman or women they should marry, by way of jointure, rent charges not exceeding 750*l.* per annum for life, to be issuing out of and chargeable upon the devised estates, clear of all taxes and deductions whatsoever. W. T. died without issue, and T. P. entered into possession of the estates, and by his will charged them with 750*l.* per annum by way of jointure to his wife, under the power, and died without

issue male, whereupon G. P. entered into possession:—*Held*, that G. P. was chargeable with legacy duty after the rate of 10*l.* per cent. on the value of the rent charge of 750*l.* per annum. *Attorney-general v. Pickard*, 552

LIEN.

In trover for certain iron-work, the defendant set up as a defence a lien on the iron-work, for work done to it at the plaintiff's request.—*Held*, that a claim of set-off to a larger amount on the part of the plaintiff, was no answer to the lien, unless it had been agreed between the parties that the one should be deducted from the other. *Pinnock v. Harrison*, 532

LIMITATIONS, (STATUTE OF).

(1). *When it begins to run.*

The defendant was indebted to the plaintiffs in a balance of 2245*l.*, for which they held his overdue promissory note. In 1827, the plaintiff and defendant agreed that the defendant should pay the balance as follows:—245*l.* in cash, and the remainder by annual payments of 300*l.* a year out of his salary as a consul abroad, and by the proceeds of certain wines consigned by him to India; and that the plaintiff should hold his promissory note as a security for the payment of the account. The 245*l.* was paid, and the 300*l.* was also duly paid in 1828 and 1829, but the defendant made default in payment of it in September 1830:—*Held*, that the plaintiffs were entitled, at any time within six years from September 1830, to sue the defendant on the promissory note, or for the balance remaining due, on a count upon an account stated. *Irving v. Veitch*, 90

(2). *Part Payment.*

Where a debtor draws a bill of exchange, to be applied in part payment

MASTER AND SERVANT.

of the debt, and the bill is paid when due by the drawee to the creditor, it operates as part payment, to defeat the Statute of Limitations, only from the time of the delivery of the bill by the debtor, not from the time of its payment. *Irving v. Veitch*, 90

(3). *What sufficient Acknowledgment within.*

The following letter from the defendant to the plaintiffs' attorney was held not to be a sufficient acknowledgment of a debt to take the case out of the Statute of Limitations:—“Since the receipt of your letter (and indeed for some time previously,) I have been in almost daily expectation of being enabled to give a satisfactory reply to your application respecting the demand of Messrs. M. against me. I propose being in Oxford to-morrow, when I will call upon you on the matter.”

The construction of a doubtful document, given in evidence to defeat the Statute of Limitations, is for the Court, and not for the jury. If it be explained by extrinsic facts, they are for the consideration of the jury. *Morrell v. Frith*, 402

LIQUIDATED DAMAGES.

See RESTRAINT OF TRADE.

MASTER AND SERVANT.

Declaration in case stated that the plaintiff was a servant of the defendant in his trade of a butcher; that the defendant had desired and directed the plaintiff, so being his servant, to go with and take certain goods of the defendant in a certain van of the defendant then used by him, and conducted by another of his servants, in carrying goods for hire upon a certain journey; that the plaintiff, in pursuance of such desire and direction, accordingly commenced and was pro-

ceeding, and being carried and conveyed by the said van, with the said goods; and it became the defendant's duty to use proper care that the van should be in a proper state of repair, and should not be overloaded, and that the plaintiff should be safely and securely carried thereby: nevertheless, that the defendant did not use proper care that the van should not be overloaded, or that the plaintiff should be safely and securely carried; in consequence of the neglect of which duties, the van gave way and broke down, and the plaintiff was thrown to the ground, and his thigh fractured:—*Held*, on motion in arrest of judgment, after verdict for the plaintiff, first, that it was sufficiently to be collected from the declaration that the defendant directed the plaintiff to go in the van; but, secondly, that, even in that case, the action was not maintainable. *Priestley v. Fowler*, 1

MONEY PAID.

L. & Co., being the bankers of *K.*, received on his account a cheque for 100*l.* from one *E. T.*, drawn by him upon the Bank of England, which cheque was lost by *L. & Co.* *E. T.*, at the request of *L. & Co.*, wrote to the Bank of England, requesting them not to pay the cheque if presented. *E. T.* was afterwards requested by *L. & Co.* to give them another cheque for the same amount, upon receiving an indemnity from all loss which he might sustain by so doing, which *E. T.* promised to do, and the indemnity was accordingly sent. *E. T.* subsequently wrote to *L. & Co.* to say he could not conveniently send the cheque, but that he would take the earliest opportunity of handing them the amount. *L. & Co.* were called upon and obliged to pay the amount of the lost cheque to *K.*:—*Held*, under these circumstances, that an action by *L. & Co.* against *E. T.*,

for money paid, or on an account stated, could not be supported. *Lubbock v. Tribe*, 607

MONEY HAD AND RECEIVED.

1. The plaintiff having married a lady possessed of funded property, to which she was entitled by the settlement on her marriage with a former husband, they employed the defendant to dispose of it, and out of the proceeds first to pay off a mortgage of the former husband, and to prepare a settlement of the residue, the interest to be secured for the wife for life, with remainder to the plaintiff for life if he survived her, with reversion to her children: the defendant and two other persons to be trustees:—*Held*, that although the defendant had paid over to the plaintiff certain sums out of the proceeds of the sale (after payment of the mortgage,) the plaintiff could not sue him for the residue, as money had and received to his use. *Milcham v. Eicke*, 407

2. Where an action was brought in the name of *A.* against *B.* on a bill of exchange, but it appeared that *C.*, the drawer of the bill, was the real plaintiff, and that *A.* only lent his name because *C.* was unwilling that his should appear, and that *A.* gave no instructions to and had no communication with the attorney; and the attorney received a sum of money from *B.* on the settlement of that action:—*Held*, in an action for money had and received by *A.* against the attorney, to recover such sum, the jury having found that it was received for *C.* and not for *A.*, that the plaintiff could not recover. *Clark v. Dignam*, 478

3. On the 1st September, 1834, a seizure of spirits was made by the officers of excise on the plaintiffs' premises. The plaintiffs applied to the Commissioners of Excise for the

700 MONEY HAD & RECEIVED.

restoration of the spirits; first, on security being given for payment of any penalties incurred; then, on payment of their value, to abide the result of the inquiry; which requests were refused. A writ of appraisal having been sued out, in order to the condemnation of the goods, the plaintiffs proposed to the Commissioners to pay the amount at which they were appraised, upon their restoration. The Commissioners answered "that they could accept no offer for the restoration of the seizure, the acceptance of which might prejudice the proceedings for penalties;" whereupon the plaintiffs stated, that, by their paying the money, "they gave up all claim to the seizure, and held themselves responsible for such proceedings for penalties as the Board might think fit to institute." The Commissioners thereupon agreed to restore the spirits; and accordingly, on the 11th September, the appraised value was paid by the plaintiffs to the defendant, the Receiver-General of Excise, and the spirits were restored to them. An information for penalties was subsequently filed against the plaintiffs, in which a verdict was taken for the Crown, by consent, for a mitigated amount of penalties. In November, 1886, the plaintiffs gave the defendant notice of action, and re-demanded the money:—*Held*, that the plaintiffs could not recover back the money so paid, in an action for money had and received, inasmuch as it was paid on a binding agreement, made upon good consideration, whereby the plaintiffs agreed that it should not be recoverable back; and further, that they were precluded from recovering by the provisions of the 7 & 8 Geo. 4, c. 53, s. 98.—*Held*, also, that, at all events, the action could not be maintained against the defendant, inasmuch as the money was received by

PAWNBROKERS' ACT.

him only for the purpose of its being paid over pursuant to the act of Parliament, and it was not shown that it remained in his hands till he had notice to retain it. *Atlee v. Backhouse*, 638

OUSTER.

See EJECTMENT, 1.

PARTICULARS.

Of Objections to Title.

In an action for money had and received, brought to recover back the deposit paid to the auctioneer upon the sale of an estate, on the ground of objections to the title, the defendant is entitled to particulars of the objections arising upon matters of fact, but not of objections in point of law. *Roberts v. Rowlands*, 543

PARTIES TO ACTIONS.

A. & B. carried on business together as solicitors in partnership, and held themselves out as such, and the defendant employed them in that capacity. By the agreement under which A. & B. entered into business together, B. was to receive annually out of the profits the sum of 300*l.*, but he was not to be in any manner liable to the losses of the business, and was to have a lien on the profits for any losses he might sustain by reason of his liability as a partner:—*Held*, that A. & B. were properly joined as plaintiffs in an action for work and labour, as the money, when recovered, would be the joint property of both until the accounts were ascertained and the division took place. *Bond v. Pittard*, 357

PAWNBROKERS' ACT.

Trover for certain gold and silver watches. Plea, that the defendant was a pawnbroker, and that they were deposited with him as pledges and security for a sum of money advanced;

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and which had not been repaid. Replication, that before they were so pledged, it was corruptly agreed that the defendant should lend and advance to the plaintiff a sum exceeding 10*l.*, to wit, 77*l.* 11*s.* 7*d.*, and that defendant should forbear and give day of payment thereof to the plaintiff until the expiration of one year next after such loan or advancement, and that plaintiff for such loan, &c. should give more than lawful interest, &c.; and that, for securing the repayment of the sum, with interest, the plaintiff should pledge the watches with defendant: that in pursuance thereof the watches were deposited and the money advanced, and the interest agreed to be paid exceeded the rate allowed by law, whereby the agreement was wholly void. Issue thereon. At the trial, it was proved that the watches were deposited, but that no agreement was made as to the time they should remain in pledge. The Judge, upon application, amended the record by inserting, after the words, "until the expiration of one year after such loan," the words "redeemable in the meantime." The plaintiff having recovered a verdict: — *Held*, on motion to enter a non-suit, that this was a contract within the Pawnbrokers' Act, and that it was to be assumed from the circumstances that the plaintiff had dealt with the defendant in the character of, and upon the usual terms of dealing with, a pawnbroker. *Nickisson v. Trotter*, 130

PENAL ACTION.

1. What is.

An action of debt for penalties for not setting out tithes, on the stat. 2 & 3 Edw. 6, c. 13, is a penal action within the stat. 21 Jac. 1, c. 4, s. 4, and therefore the new rules as to pleading do not apply to such a case,

PLEADING.

and nil debet is still a good plea to such an action. *Earl Spencer v. Spau-nell*, 154

2. Amendment in.

The Court allowed the declaration in a penal action (against a magistrate for acting without a qualification) to be amended after special demurrer, on the terms of the defendant's pleading de novo, and the plaintiff's undertaking to try at the next assizes; although the declaration had already been once before amended on the plaintiff's application, and although the defendant produced affidavits that the plaintiff was a person in indigent circumstances, and that he (the defendant) was advised and believed that he had a good defence on the merits. *Jones v. Edwards*, 218

PENALTY OR LIQUIDATED DAMAGES.

See RESTRAINT OF TRADE.

PLEADING.

See APOTHECARIES' ACT.

BANKRUPTCY, III.

CONTRACT, (3).

FRAUDS (STATUTE OF).

INTEREST.

MASTER AND SERVANT.

MONEY HAD AND RECEIVED.

SLANDER, (1).

TRESPASS, (2).

TROVER, (3).

1. General Points.

(1). Rule to Plead several matters.

Where several pleas are pleaded, which amount only to one entire answer to the declaration (as the general issue to part, payment to other part, &c.), no rule to plead several matters is necessary. *Archer v. Garrard*, 63

(2). Pleading issuably, construction of.

The common order for "time to plead, pleading issuably," applies to the plea only. *Woodman v. Goble*, 304

(3). *Dating Pleadings.*

The rule of H. T. 4 Will. 4, requiring that "every pleading" shall be entitled of the day of the month and year when pleaded, does not apply to a *similiter* added by one party for the other. *Shackel v. Ranger*, 409

II. *Declaration.*(1). *Commencement and Conclusion.*

The Court refused to set aside a declaration in ejectment, on the ground that it contained no *quo minus* clause. *Doe d. Bloxam v. Roe*, 187

(2). *Account stated, form of.*

The declaration stated that the defendant was indebted to the two plaintiffs and one M. in his lifetime for money found to be due from the defendant to the plaintiffs and M. on an account stated *between them*, laying the promise to the plaintiffs and M. in his lifetime. Breach, that the defendant hath disregarded his promise, and "*hath not paid any of the said monies, or any part thereof:*"—*Held*, first, that the accounting was sufficiently shewn to have been between the defendant and the plaintiffs, and not between the plaintiffs only; 2dly, that the breach was sufficient. *Debenham v. Chambers*, 128

(3). *Misjoinder of Counts against Executor.*

Counts for goods sold to and work and labour done for the defendant, *as executor*, cannot be joined with a count for money found to be due on an account stated with the defendant *as executor*. *Corner v. Shew*, 350

(4). *For not accepting Goods.*

Assumpsit.—The declaration stated that the defendant, carrying on business at Liverpool, sent and delivered to the plaintiffs, carrying on business at New Orleans, an order to purchase

cotton for the defendant, viz., if they, the plaintiffs, could purchase cotton at such price as to stand in, laid down in Liverpool, all charges included, Liverpool fair, 9½d. per lb., good fair, 10d. per lb., then the plaintiffs were to purchase cotton to the extent of 200 bales, and if at ½d. per lb. under those prices, 300 bales; if at ¼d. per lb. under those prices, 400 bales; and to draw bills of exchange on the defendant for the amount of the price. The declaration then averred that the plaintiffs accepted the order, and promised to perform all things therein contained to be by them performed, and in consideration of the premises the defendant promised to accept and receive the cotton to be purchased by the plaintiffs in pursuance of the order, and to accept any bill drawn by the plaintiffs on the defendant for the price of the cotton. The declaration then averred that the plaintiffs did purchase a large quantity, to wit, 206 bales of Liverpool fair cotton, at such a price as to stand in 9½d. per lb. laid down in Liverpool, all charges included: it then stated the shipping of the cotton, that the plaintiffs drew a bill for the amount, that afterwards, to wit, on &c., the said cotton arrived in Liverpool, *and then was ready to be delivered to the defendant*, of all which he had notice: and the plaintiffs afterwards, to wit, on &c., requested the defendant to accept the said cotton, and to accept the said bill of exchange, which was then presented to the defendant for acceptance. Breach—that the defendant did not nor would accept the cotton so purchased, or any part of it, and did not nor would accept the bill, or pay or satisfy the plaintiffs for the said cotton:—*Held*, on demurrer, that the declaration was ill, as it did not sufficiently shew that the plaintiffs were ready and willing to deliver the 200 bales only. *Dixon v. Fletcher*, 146

(5). *By Assignee of Bail-bond.*

In an action by an assignee of a bail-bond, the declaration stated that the sheriff, "by an indorsement on the said writing obligatory duly made and sealed with the seal of the officer of the said sheriff, assigned the said writing obligatory to the said plaintiff, according to the form of the statute:"—*Held*, on special demurrer, that the declaration was good, and that it was not necessary to state in the declaration that the assignment was under the hand of the sheriff, and executed in the presence of two witnesses. *Lewis v. Parkes*, 133
(See also post, IV. (8).)

III. *Pleas in Abatement.*

A plea in abatement, of the coverage of the defendant, is not a plea of non-joinder, within the meaning of the statute 3 & 4 Will. 4, c. 42, s. 8. *Jones v. Smith*, 526

IV. *Pleas in bar.*(1). *Nil debet, where allowable.*

An action of debt for penalties for not setting out tithes, on the statute 2 & 3 Edw. 6, c. 13, is a penal action within the statute 21 Jac. 1, c. 4, s. 4, and therefore the new rules as to pleading do not apply to such a case, and nil debet is still a good plea to such an action. *Earl Spencer v. Swannell*, 154

(2). *General Issue, what admitted by.*

Declaration in assumpsit stated that the defendants were the owners of a vessel lying in a certain river, and bound to Liverpool; that the plaintiff caused to be shipped on board her a quantity of potatoes, to be safely carried by the defendants, as owners of the said vessel, to Liverpool; and, in consideration thereof, and of certain freight, the defendants promised the plaintiff to take proper care of and safely carry the said goods as afore-

said: with a breach, that, through the defendants' negligence, they were damaged. Plea, non assumpsit: *Held*, that the ownership of the defendants was not admitted by the plea.

A plea denying a particular fact alleged in the declaration does not admit other immaterial allegations in the declaration.

Quære, whether it admits the other material allegations, so that they may be taken as facts to go to the jury? *Bennion v. Davison*, 179

(2). *Evidence under General Issue.*

1. Declaration in case against a sheriff for a false return to a fi. fa., stated the judgment and writ; that the writ was delivered to the defendant as sheriff, to be executed; and that, although there were then and afterwards, before the return of the writ, goods of the debtor within the defendant's bailiwick, whereof he could and ought to have levied the monies indorsed on the writ, and although a reasonable time to have made the levy had elapsed, yet the defendant, not regarding his duty, did not within such reasonable time levy the money, but therein wholly failed and made default, nor hath he paid the money, or any part thereof, to the plaintiff; and the defendant afterwards falsely returned nulla bona:—*Held*, that the defendant could not set up as a defence, under the plea of not guilty, that the debtor had assigned the goods to a third party. *Lewis v. Alcock*, 188

2. In debt, the defendant cannot give in evidence, even in mitigation of damages, under a plea of nunquam indebitatus, or set-off, money payments made by him to the plaintiff. *Cooper v. Morecraft*, 500

(4). *When bad as amounting to General Issue.*

1. Case for the negligent manage-

ment of a train of railway carriages, whereby it ran against another train, in one of which the plaintiff was riding, and injured him. Plea, that the parties having the management of the train in which the plaintiff was, managed it so negligently and improperly, that, in part by their negligence, as well as in part by the defendants' negligence, the defendants' train ran against the other, and caused the injuries to the plaintiff:—*Held*, that the plea was bad in form, as amounting to not guilty; and in substance, for not shewing, not only that the parties under whose management the plaintiff was were guilty of negligence, but also that by ordinary care they could have avoided the consequences of the defendant's negligence. *Bridge v. Grand Junction Railway Company*, 244

2. Assumpsit for money paid. Plea, as to 500*l.*, parcel, &c., actionem non, because the defendants say that heretofore, to wit, on the 11th of January, 1836, they were possessed of a certain bill of exchange theretofore drawn by the defendants upon, and accepted by one Mason, whereby they required Mason to pay to their order 500*l.*, six months after the date thereof, and thereupon, in consideration that the defendants would indorse and deliver the said bill to the plaintiffs, the plaintiffs promised and agreed with the defendants to lend to, or pay, lay out, and expend for the defendants the sum of 500*l.*, from time to time, in such sums and in such manner as the defendants should thereafter require or direct, and to hold and retain the bill of exchange, for and on account and as payment of the said sum of 500*l.*; and the defendants further say, that they did endorse and deliver the said bill to the plaintiffs, and the plaintiffs then took and received the same from the defendants, and still hold the same for and on account and

as payment of the said sum of 500*l.* so agreed to be lent or paid, laid out, and expended, for the defendants as aforesaid; and the defendants say that the sum of 500*l.* parcel, &c., in the introductory part of the plea mentioned, is composed and made up of divers sums of money lent to, and paid, laid out, and expended for the defendants on account of the bill, and in pursuance of the said promise and agreement. Verification.—*Held*, on special demurrer, that the plea was bad, as amounting to the general issue. *Maude v. Nesham*, 592

(5). *Payment into Court.*

1. In assumpsit, the first count was on an agreement whereby the defendant engaged the plaintiff as cook for five months certain, at ten guineas a month, and agreed, in case she discharged him before the end of the five months, to pay him the fifty guineas and his expenses back to Paris or England; and the count, after averring that the plaintiff served the defendant two months, and was ready and willing to serve for the remainder of the five months, alleged as a breach that the defendant refused to continue him in her service, and dismissed him before the end of the five months, and refused to pay him the fifty guineas, or any sum towards his expenses back. There was another count for 5*l.* 10*s.* for wages as the defendant's hired servant. The defendant pleaded, 1st, as to the first count, except as to 21*l.*, parcel, &c., that the plaintiff wrongfully quitted her service; 2nd, as to the first count, except as to the said sum of 21*l.*, that she dismissed him for improper conduct; 3rd, as to the second count, except as to 21*l.* parcel, &c., non assumpsit; and 4th, payment into Court of 34*l.* 18*s.* in the form given by the new rules for a plea of payment into Court on the whole declaration. Replications, join

ing issue on the first and third pleas, *de injuria* to the second, and to the fourth, damages *ultra*. At the trial, the jury found for the plaintiff on the first issue, and for the defendant on the second and third:—*Held*, that the plaintiff was entitled to judgment on the whole record, at least for nominal damages. *Fischer v. Aide*, 486

2. Declaration in assumpsit, against assignees of a bankrupt, stated that the plaintiff had agreed with the bankrupt, before his bankruptcy, to permit him to take stones from the plaintiff's quarry at a certain price, for a church which he, the bankrupt, had undertaken to build, and that he took therefrom stones to the amount of 50*l.*; that the defendants, as his assignees, adopted his contract for building the church, and thereby became bound by its equities, and so liable to pay the plaintiff the 50*l.*; and that afterwards they took from the quarry stones for the same purpose to the amount of 40*l.* Plea, as to the agreement of the plaintiff with the bankrupt, non assumpsit; as to the residue of the causes of action, payment into court of 6*l.* 12*s.* 11*d.*; which the plaintiff accepted in satisfaction of that sum. The jury having found for the defendants on the first issue:—*Held*, that the admission in the plea of payment into court did not entitle the plaintiff to have a verdict entered for him on the other issue. *Twemlow v. Askey*, 495

3. A declaration in debt stated that the defendant was indebted to the plaintiff in 75*l.* (made up of five counts for 15*l.* each), and, giving credit for 10*l.* paid, concluded for a balance of 65*l.* The particulars also gave credit for the 10*l.*, and claimed a balance of 12*l.* 11*s.* 6*d.* The defendant pleaded, 1st, *nunquam indebtedatus*, except as to 10*l.* 13*s.*, parcel &c.; 2d, as to 10*l.*, other parcel, (payment before action brought) 3d,

as to the sum of 10*l.* 13*s.*, payment into court of that sum, in discharge of the causes of action in the declaration mentioned. The plaintiff replied, that he accepted the 10*l.* 13*s.*, in satisfaction of the causes of action; and took it out of court, and taxed his costs thereon:—*Held*, that the defendant was entitled to sign judgment of non pros., for want of any answer to the other pleas. *Emmott v. Standen*, 497

(6). *Release*.

A covenant not to sue upon a simple contract debt for a limited time is not pleadable in bar of an action for such debt. *Thimbleby v. Barron*, 210

(7). *Set-off*.

A plea of set-off stated that, at the time of the commencement of the action, the plaintiff *was indebted* to the defendant in sums of money exceeding the debt claimed by the plaintiff, but omitted to add, "*and still is*" indebted:—*Held*, on demurrer, that the plea was bad. *Dendy v. Powell*, 442

(8). *Immaterial Traverse*.

Declaration in assumpsit stated, that the sheriff had seized goods of the plaintiffs under a *fi. fa.*, issued on a judgment upon a warrant of attorney, which was executed by the plaintiffs and R., for the use and benefit of the defendant, and to S., as his trustee, and as a security for monies due from the plaintiffs and R. to the defendant; that the goods continued in the hands of the sheriff; and thereupon it was agreed between the plaintiffs and the defendant, that the plaintiffs should give the defendant two other warrants of attorney, one for the amount due on the judgment, the other for a debt due from R. to the defendant, and that the defendant should procure the goods to be re-delivered to the plaintiffs; that

the plaintiffs did accordingly give the defendant the two warrants of attorney, but the defendant did not then or within a reasonable time, procure, nor has he, although a reasonable time has elapsed, procured the goods to be re-delivered to the plaintiffs. Plea, that the warrant of attorney in the declaration mentioned to have been executed by the plaintiffs and R., was not given for the use and benefit of the defendant, or to S. as his trustee: *Held* bad, on special demurrer, as traversing an immaterial allegation.

Held, also, that the declaration was good on general demurrer, although the warrants of attorney were not set out, and although there was no averment of a request to the defendant to cause the goods to be re-delivered. *Radford v. Smith*, 254

V. Replication, &c.

(1). *De injuriâ*.

1. Trespass for assaulting plaintiff, and striking him with a bludgeon, and with the said bludgeon striking and pushing him down to and upon the ground. Pleas, first, not guilty; secondly, as to *assaulting, beating, and illtreating* the plaintiff, that defendant was possessed of a public-house, that plaintiff made a great noise and disturbance therein, and obstructed the business; whereupon defendant requested him to cease from making such noise and disturbance, and to leave the house, which he refused; whereupon defendant, in defence of his possession, *molliter manus imposuit* to remove plaintiff, and did remove him out of the house:—thirdly, as to *assaulting, beating, and ill-treating* the plaintiff, son assault demesne. Replication to the two latter pleas, *de injuriâ*. At the trial, the Judge directed the jury, that, even though the plaintiff assaulted the defendant first, if the defendant struck the plaintiff with a bludgeon, he was

not justified on these pleadings:—*Held*, that this was a misdirection.

Quære, whether the pleas were a sufficient answer to the whole of the trespasses charged in the declaration? *Oakes v. Wood*, 180

2. When a plea to a declaration on a contract amounts to the general issue, the replication *de injuriâ* is bad.

Scemle, that it is also bad where the plea is in avoidance of the contract itself.

But such a replication is only bad upon special demurrer. *Parker v. Riley*, 230

(2). *Departure*.

Debt on bond conditioned for the payment of an annuity. Plea, that the writing obligatory was made after the passing of the 53 Geo. 3, c. 141, and that the annuity was granted for a pecuniary consideration, and that no memorial of the said writing obligatory, containing the names of all the witnesses thereto, and the date of the writing obligatory, and the names of all the parties thereto, or of the person for whose life the annuity was granted, and of the person by whom the annuity was to be beneficially received, or of the pecuniary consideration for granting the said annuity, or how such consideration was paid, or the annual sum to be paid thereby, was enrolled in Chancery. Replication, that a memorial was duly enrolled (setting it out), and averring that it contained the statements mentioned in the plea. Rejoinder, that the memorial contained divers false statements relating to matters of fact material to the validity of the annuity, especially in this, that the memorial imported and represented that the consideration for the annuity was paid in notes of the Bank of England, whereas it was never paid in such notes or otherwise, *modo et formâ* as in the replication alleged: and so the defendant again says, that there never

was any such memorial as by the act of Parliament is required, enrolled in Chancery as the act requires:—*Held*, on special demurrer, that the rejoinder was not a departure from the plea. *Hickes v. Cracknell*, 72

POWER.

(1). *Execution of, by Will.*

A married woman had power, under her marriage settlement, to appoint certain lands to uses by her last will and testament, "signed and published in the presence of, and attested by, three or more credible witnesses." The reversion in the same lands, subject to certain life estates, was also vested in her. She made a will, containing a devise of all her property real and personal, but not referring to the power. The attestation stated the will to be signed, sealed, and delivered by the testatrix in the presence of three witnesses, whose names were subscribed:—*Held*, that the will was a due execution of the power. *Delivery* is equivalent to *publication* of a will. *Curteis v. Kenrick*, 461

(2). *How destroyed.*

By indentures of lease and release, dated in December, 1819, and by fine and recovery, certain lands were settled to such uses as W. T. D. and F. his wife should, at any time during their joint lives, by deed or other instrument in writing duly executed, direct and appoint; and in default of appointment, to the use of W. T. D. for life, with remainder to trustees to preserve contingent remainders; then to the use of the wife for life, with remainder to trustees to preserve contingent remainders; then to the use of the sons of W. T. D. and F. in succession in tail general; and then to the use of the daughters in tail general, with cross remainders, and with remainder to W. T. D. in fee. In 1824, W. T. D. took the benefit of

the Insolvent Act, and conveyed to the provisional assignee all his interest in the premises, which was subsequently transferred by the provisional assignee to the assignee of the estate, in the usual way. In September, 1828, W. T. D. and F. his wife, in execution of their joint power of appointment, by indentures of lease and release conveyed the premises to trustees in fee, upon trust for benefit of all the creditors of W. T. D.:—*Held*, that the power of appointment was not destroyed by the conveyance to the provisional assignee, and that the power was well executed by the indentures of lease and release of September, 1828, so as to convey the estate for life of the wife and the estates tail of the children to the trustees under that deed. *Jones v. Winwood*, 653

PRACTICE.

I. *Rule to Plead.*(1). *When to be entered.*

There is no irregularity in entering a rule to plead before notice of declaration, but on the same day. *Aikman v. Conway*, 71

II. *Staying Proceedings.*

1. On a motion for costs of the day, a stay of proceedings cannot be had, although two days' notice of the motion be given. *Eager v. Cuthill*, 60

2. Proceedings against the sheriff, in an action against the acceptor of a bill of exchange, will be stayed on payment of the debt and costs in that action only, notwithstanding there is an action pending against the drawer also. *Vaughan v. Harris*, 542

III. *Setting aside Proceedings.*

The rule requiring a term's notice before any step be taken in a cause, after the lapse of four terms, does not apply to a motion to set aside proceedings for irregularity, but only to

any steps taken towards judgment.
Lumley v. Thompson, 632

IV. Service of Rule.

On Joint Contractors.

Upon an interlocutory judgment against three joint makers of a promissory note, service of the rule nisi on two of them is sufficient, where the plaintiff is unable to serve the three. *Carter v. Southall*, 128

V. Rule to Compute.

After the delivery of a declaration in debt for goods sold and on a promissory note, the defendant paid the plaintiff 150*l.* "on account of the cause," leaving a balance due less than the amount of the note:—*Held*, that the plaintiff could not have a rule to compute principal and interest on the note, without the count for goods sold being first struck out of the declaration. *Jones v. Shiel*, 433

VI. Judgment as in Case of Nonsuit.

1. In a country cause, where no notice of trial has been given, the defendant cannot move for judgment as in case of a nonsuit until after two assizes have elapsed. [But see post, pl. 2.] *Smith v. Miller*, 60

2. Where, in a country cause, issue is joined before or in a non-issuable term, and no notice of trial is given, and the plaintiff does not try at the next assizes, the defendant may move for judgment as in case of a nonsuit in the term next after the assizes.

But where issue is joined in a term next preceding the assizes, the motion cannot be made until after two assizes have elapsed. *Evans v. Barnard*, 276

VII. Inspection of Deed.

Where an action on certain bills of exchange was brought against a defendant, who pleaded that he was liable, if at all, as a surety only:—*Held*, that he was not entitled to the

inspection of a deed in the plaintiff's possession, by which it was suggested time had been given to the principal debtor, but to which deed the surety was no party. *Smith v. Winter*, 308

VIII. Notice of Trial.

The defendant obtained a judge's order for time to plead, pleading issuably, rejoining gratis, and taking short notice of trial, if necessary, whether before the sheriff or not. The plaintiff subsequently obtained an order to try before the sheriff. *Held*, that the defendant was not bound by the order to take short notice of trial, unless the plaintiff gave it for the next sitting of the sheriff after the date of the order.

The retaining an irregular notice of trial is no waiver of the irregularity. *Dignam v. Ibbotson*, 431

IX. Trial.

(1). Right to begin.

Where, upon a question whether the plaintiff or defendant has a right to begin, the Judge at Nisi Prius has decided clearly and manifestly wrong, the Court will grant a new trial. *Huckman v. Fernie*, 505

X. On Demurrer.

Where there is a demurrer to a pleading, and the party joining in demurrer does not state in the margin of his demurrer book any objection to a former pleading, *semble*, that he is not entitled to object to its sufficiency on the argument; especially where it is only cause of special demurrer. *Parker v. Riley*, 290

PREScription ACT.

See EASEMENT.

PRISONER.

1. Discharge under 48 Geo. 3, c. 123.

Where a defendant had given a cognovit for debt and costs to an

PRISONER.

amount exceeding 20*l.*, though the original debt was under that amount, and had remained in execution for twelve successive calendar months:—*Held*, that he was entitled to be discharged out of custody under 48 Geo. 3, c. 123, the amount of costs being still costs within the meaning of that statute. *Rathbone v. Fowler*, 187

2. When to be charged in Execution.

After a trial in Trinity Vacation, the defendant surrendered in discharge of his bail in Michaelmas Vacation:—*Held*, that the surrender had relation back to the preceding Michaelmas Term; and, therefore, by the rule of this Court, Trin. 20 & 27 G. 2, the defendant must be charged in execution in Hilary Term. *Baxter v. Bailey*, 415

PROCESS.

I. Writ of Summons.

(1). Several Writs.

There is no irregularity in issuing several writs of summons for the same cause of action, when there are several defendants, if they are issued on the same præcipe, and dated the same day. *Angus v. Coppard*, 57

(2). Indorsement of Debt and Costs on.

An action of debt for a penalty for bribery, under the Municipal Corporation Act, is not within the Uniformity of Process Act, requiring an indorsement on the writ of summons of the amount of Debt and costs. *Davies v. Lloyd*, 70

(3). Time for setting aside.

A defendant seeking to set aside the service of a writ of summons for irregularity, must apply within the time limited for appearance. *Child v. Marsh*, 433

RAILWAY SHARES. 309

II. Capias.

(1). Form of.

The omission of the date in the copy of a capias served on the defendant, is an irregularity for which the defendant will be discharged on entering a common appearance. *Smart v. Johnstone*, 69

III. Fieri Facias.

(1). How for Goods bound by.

Although the goods of a debtor are bound from the delivery of a writ of execution to the sheriff, yet the property in them is not changed by it, and is still in the debtor, and he may sell them, subject to the rights of the execution creditor, to which they will be liable in the hands of a purchaser, unless the sale took place in market overt. *Samuel v. Duke*, 622

PROHIBITION.

Where the want of jurisdiction appears on the face of the process, the Court will grant a prohibition after sentence.

Semble, that it will also grant it, though the want of jurisdiction does not so appear, when the party has had no opportunity of applying earlier to a superior court, and has not acquiesced in the proceedings. *Roberts v. Humby*, 120

RAILWAY SHARES.

1. By a railway act, it was declared that the shares in the undertaking, or the joint stock and fund of the company, should to all intents and purposes be deemed personal estate, and be transmissible as such, and should not be of the nature of real property: *Held*, that the shares of individual proprietors were not an interest in land, and therefore might be sold by a verbal contract.

And *semble*, this would have been

so even if the act had contained no such clause. *Bradley v. Holdsworth*, 422

2. To assumpsit by assignees of a bankrupt for the non-acceptance of shares in the Great Western Railway, which the bankrupt, before his bankruptcy, had contracted to sell to the defendant, and to convey to him on a day which was subsequent to the bankruptcy—the declaration averring that the plaintiffs were the proprietors of the shares, and that they tendered certificates of them to the defendant; the defendant pleaded, thirdly, that the plaintiffs were not the proprietors of the shares; fourthly, that they did not tender certificates of them to the defendant.

In order to prove their proprietorship of the shares, the plaintiffs put in the transfer book kept by the Great Western Railway Company under the Railway Act 6 & 7 Will. 4, c. 107, s. 158, in which the plaintiffs were entered as transferees:—*Held*, that this was not sufficient evidence of their title.

The certificates tendered by the plaintiffs to the defendant did not contain the names of the plaintiffs as original proprietors, nor had they any indorsement of transfer to them:—*Held*, that such certificates were insufficient, inasmuch as they did not shew a title in the plaintiffs to convey the shares under the act (ss. 147, 158). *Hare v. Waring*, 362

RELEASE.

(1). *In deed, effect of.*

To assumpsit for the recovery of certain interest due to the plaintiff on the sale by him to the defendant of a policy of insurance on life, the defendant pleaded, that by indenture made between the plaintiff and defendant, the plaintiff released, exonerated, and discharged the defendant

of and from all claim and demand whatsoever for, upon, or in respect of the purchase of the policy, and all monies due to the plaintiff in respect thereof, and of and from the supposed cause of action in the declaration mentioned. It appeared in evidence that the policy was sold subject to a condition that the purchaser should pay down a deposit of 20l. per cent, and sign an agreement for payment of the remainder on the 8th June, 1835; but, should the completion of the purchase be delayed, the purchaser was to pay interest on the balance of the purchase money, at 5l. per cent per annum, from that day until the purchase was completed. The defendant did not complete the purchase till Jan. 1836, when he paid the purchase money in full, with interest from the 8th June, and an assignment of the policy, duly executed by the plaintiff, containing a release in the terms stated in the plea, and having a receipt for the whole purchase money indorsed, was handed to the defendant. It was afterwards discovered that the plaintiff's attorney, on that occasion, under-calculated the interest by 34l.:—*Held*, that the release was a bar to an action for that sum. *Harding v. Ambler*, 279

(2). *What amounts to Plea of.*

See PLEADING, IV. (6).

RESTRAINT OF TRADE.

By a written agreement, the plaintiff and defendant agreed to become partners in the business of stage-coach proprietors, for the purpose of running a coach daily, at certain hours, between London and Croydon. The agreement contained various stipulations as to the conduct of the business, and a provision that it should be lawful for either party to determine the partnership by giving four weeks'

notice in writing. It contained also the following articles: 12th, that in the event of such dissolution of partnership, and so long as the plaintiff should continue to carry on the trade of a coach proprietor at Croydon, the defendant should not, either on his own account or that of any other person or persons, or jointly with any other, run or use for hire any stage-coach, omnibus, or other carriage, or otherwise ply for hire on any part of the road over which the coach was appointed to run, at any time within one hour before or after certain specified hours of the day, under the penalty of 40*l.*, to be recovered by the plaintiff as liquidated damages: and the last article also provided, that, without prejudice to the right of the parties under the preceding article, they bound themselves for the true and faithful performance of the agreement in every respect, under the penalty of 100*l.*, to be recovered as aforesaid:—*Held*, first, that the agreement of the plaintiff to enter into the partnership was of itself a sufficient consideration for the partial restraint of trade imposed on the defendant by the 12th article, and therefore that an action was maintainable for a breach of it, in running an omnibus on the road within the prohibited hours, after dissolution of the partnership by notice from the plaintiff; 2dly, that the 40*l.* must be construed as liquidated damages, and not as a penalty. *Leighton v. Wales*, 545

SET-OFF.

See LIEN.

PLEADING, IV. (7.)

SHERIFF.

See ATTACHMENT, (1).

Liability of, to Assignees of Bankrupt.

A sheriff who seizes and sells the

goods of a bankrupt under a *fi. fa.* before commission issued, but after an act of bankruptcy, without notice of the act of bankruptcy, is liable in trover to the assignees. *Garland v. Carlisle*, 152

SHIP.

By deed-poll, dated 21st October, 1836, the defendant sold and assigned, &c. to the plaintiff "all that ship or vessel called &c., with her masts, tackle, and appurtenances," and covenanted that he had then good right, full power, and lawful authority, to sell and assign the said premises to the plaintiff. To a declaration on this covenant, assigning as breaches, 1st, that at the time of making the deed-poll, the ship was wholly lost and destroyed, and was incapable of being assigned, &c.; 2dly, that the defendant had not at that time good right, &c. to assign her;—the defendant pleaded, 1st, that the ship was not, at the time of making the deed-poll, wholly lost and destroyed, &c.; and 2dly, that the defendant had good right, &c. to assign her. It appeared in evidence, that at the time of the sale the ship was on a foreign voyage; that, on the 13th October, she went aground in a storm on the coast of the Prince of Wales's Island, and was left by the crew, who, however, had access to her afterwards; that she lay aground five feet above water on one side, and with her masts standing, till the 24th, when the captain called a survey, and, by the surveyor's advice, sold her; that her bulk ends were strained, but that if there had been facilities at hand, and it had been a different season of the year, she might have been got off and repaired; and that she had sustained no more damage on the 21st October than when she first took the ground:—*Held*, that the covenant of the defendant, that he had power to transfer her as

a ship, was not broken. *Barr v. Gibson*, 390

SLANDER.

1. Declaration.

Declaration in slander stated that plaintiff had been and was clerk to a certain mining company; that the defendant, intending to cause it to be believed that he had been guilty, in the course of his employment, of grave crimes and felonies, heretofore, *to wit*, on the 1st July, 1836, in a discourse of and concerning the plaintiff, and of and concerning his having acted as such clerk, spoke of and concerning the plaintiff, &c., these words: "You have done things with the company for which you ought to be hanged, and I will have you hanged before the 1st of August," (thereby meaning that the plaintiff had been guilty of felonies punishable by law *with death by hanging*):—*Held* good, on motion in arrest of judgment. *Francis v. Rose*, 191

II. Privileged Communication.

A., having undertaken to build a house for B., employed C., a carpenter, to do some of the wood-work, for which A. had given an estimate. The bill sent in having exceeded the estimate, B. applied to D. to recommend him a surveyor to measure the work, upon which D. told B. that he had seen C. take away some of the quarterings; B. informed A. of it, who came to D. and asked him, did he say so? to which D. answered, "Yes, I saw the man employed by you take from B.'s house two long pieces of quartering: I hallooed to the man." In an action of slander, brought by C. against D., the Judge left it to the jury to say whether the words imputed felony; and if they thought they did, told them that still the plaintiff was not entitled to recover, unless he shewed express malice, or the jury believed from the

circumstances that the defendant was actuated by malicious motives:—*Held* that the direction was right. *Kins v. Sewell*, 297

SMUGGLING ACT.

In an information on the 3 & 4 Will. 4, c. 53, s. 44, the venue being laid in Middlesex, one count charged the defendant with assisting and being concerned in unshipping goods liable to the duties of customs, the duties for the same not having been first paid or secured. Another count charged him with harbouring and concealing goods which had been illegally unshipped, the duties thereon not having been first paid or secured. Other counts charged the defendant with being concerned in the unshipping of goods prohibited to be imported, and which had been imported into the United Kingdom; and with harbouring goods prohibited to be imported, which had been imported, &c.

It was proved on the trial, that the defendant, in England, concerted with M. a plan for smuggling tobacco into Ireland; that, in performance of such concerted plan, he took on board his vessel, on the high seas, from a cutter dispatched from Flushing for the purpose, a cargo of illegal packages, sailed with it to Neath in Glamorganshire, there took on board a quantity of culm, in order to conceal the tobacco, and sailed thence to Youghal, in Ireland, where he landed the tobacco:—*Held*, that the defendant was properly triable in England, as having, in England, assisted and been concerned in an illegal unshipping of prohibited goods within the statute, viz. the transhipment of them from the foreign vessel to his own. *Attorney-General v. Catt*, 7

STAMP.

See AGREEMENT.

TRESPASS.

SUNDAY.

See CONTRACT, III.

TIME, COMPUTATION OF.

Goods were sold on the 5th of October, to be paid for in two months:—*Held*, that an action for the price could not be commenced until after the expiration of the 5th of December. *Webb v. Fairmaner*, 473

TITHES.

See PENAL ACTION, I.

Semble, that a lessee of tithes of "sheaf corn and grain," is not (unless a usage be shewn) entitled to the title of vetches severed in their green state. *Dare v. Berham*, 539

TRESPASS.

See COSTS, I.

PLEADING, V., (1), 1.

I. Against Magistrate.

Where a party lays a complaint before a magistrate on a subject-matter over which he has a general jurisdiction, and the magistrate grants a warrant, upon which the party charged is arrested, the party laying the complaint is not liable as a trespasser, although the particular case be one in which the magistrate had no authority to act.

The complainant having accompanied the constable charged with the execution of the warrant, and pointed out to him the person to be arrested:—*Held*, that this was evidence to go to the jury of a participation in the arrest. *West v. Smallwood*, 418

II. Justification in.

(1). To remove Defendant's Goods.

A plea to a declaration in trespass for breaking and entering the plaintiff's close, that the defendant being

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possessed of certain goods, the plaintiff, without his leave and against his will, took the goods and placed them on the close in the declaration mentioned, wherefore the defendant made fresh pursuit, and entered to retake the goods, is a good plea, and a good justification of the entry on the plaintiff's close. *Patrick v. Colerick*, 489

TROVER.

(1). By whom maintainable.

C., a merchant at Waterford, had been in the habit of consigning cargoes of grain to B., a corn-factor in Bristol, who had been accustomed to accept bills on the faith of such consignments. C. wrote to B., stating that he was about to ship him a cargo of oats, and that he had drawn on him for 550*l.* in anticipation of it, and desiring him to effect an insurance on the cargo. C. remitted the bill to B., and he accepted it. Before the vessel sailed, C. stopped payment, and he then sent the bill of lading, indorsed in blank, to F., another factor at Bristol, not informing him of his engagement with B. When the vessel arrived, F., for his own convenience, transmitted the bill of lading to B., desiring him to act for him. B. paid the freight, and took possession of the cargo, as a security for his own claim on C., and it was afterwards taken out of his possession by the defendants, who also were creditors of C., under a foreign attachment against C. out of the Tolzey Court of Bristol:—*Held*, that B. had not such a property in the goods as to enable him to maintain trover against the defendants. *Bruce v. Wait*, 15

(2). For Fixtures.

A lessee cannot, even during his term, maintain trover for fixtures attached to the freehold. *Mackintosh v. Trotter*, 184

A A A

M. W.

(3). *Pleadings.*

In trover against the sheriff and the execution creditor for taking goods under an execution, it is not competent for the sheriff, upon the plea of not possessed, to give in evidence certain facts justifying the seizure, distinguishing his case from that of the other defendants; but such a defence should be specially pleaded. *Samuel v. Duke*, 62

USE AND OCCUPATION.

Semble, that debt for use and occupation, on a parol demise, by the assignee of a reversion against the lessee, cannot be maintained for the occupation which took place before the assignment of the reversion. *Mortimer v. Preedy*, 602

VETCHES.

See TITHES.

WILL.

See POWER, 1.

WITNESS.

(1). *Competency.*

Where the question in an action of trespass was, whether the plaintiff or one T. W., under whom the defendant claimed, was entitled to the close upon which the supposed trespass was committed:—*Held*, that T. W. was a competent witness for the defendant, inasmuch as the result of the suit could not change the possession.

WRIT OF TRIAL.

Semble, that he would not have been a competent witness if the action had been ejectment. *Rees v. Walters*, 527

(2). *Payment of Expenses of.*

The attorney in a cause is not personally liable to a witness whom he subpoenas to give evidence in the cause, for his expenses of attendance. *Robins v. Bridge*, 114

WRIT OF TRIAL.

(1). *When executable.*

A writ of trial was directed to be tried in the Sheriff's Court, London, under 3 & 4 Will. 4, c. 42, s. 17, returnable on the 19th of January. A court was holden on the 18th, which was adjourned to the 20th, on which day the cause was tried:—*Semble*, that this was a mistrial, and that application ought to have been made to a Judge to have the time extended. *Mortimer v. Preedy*, 602

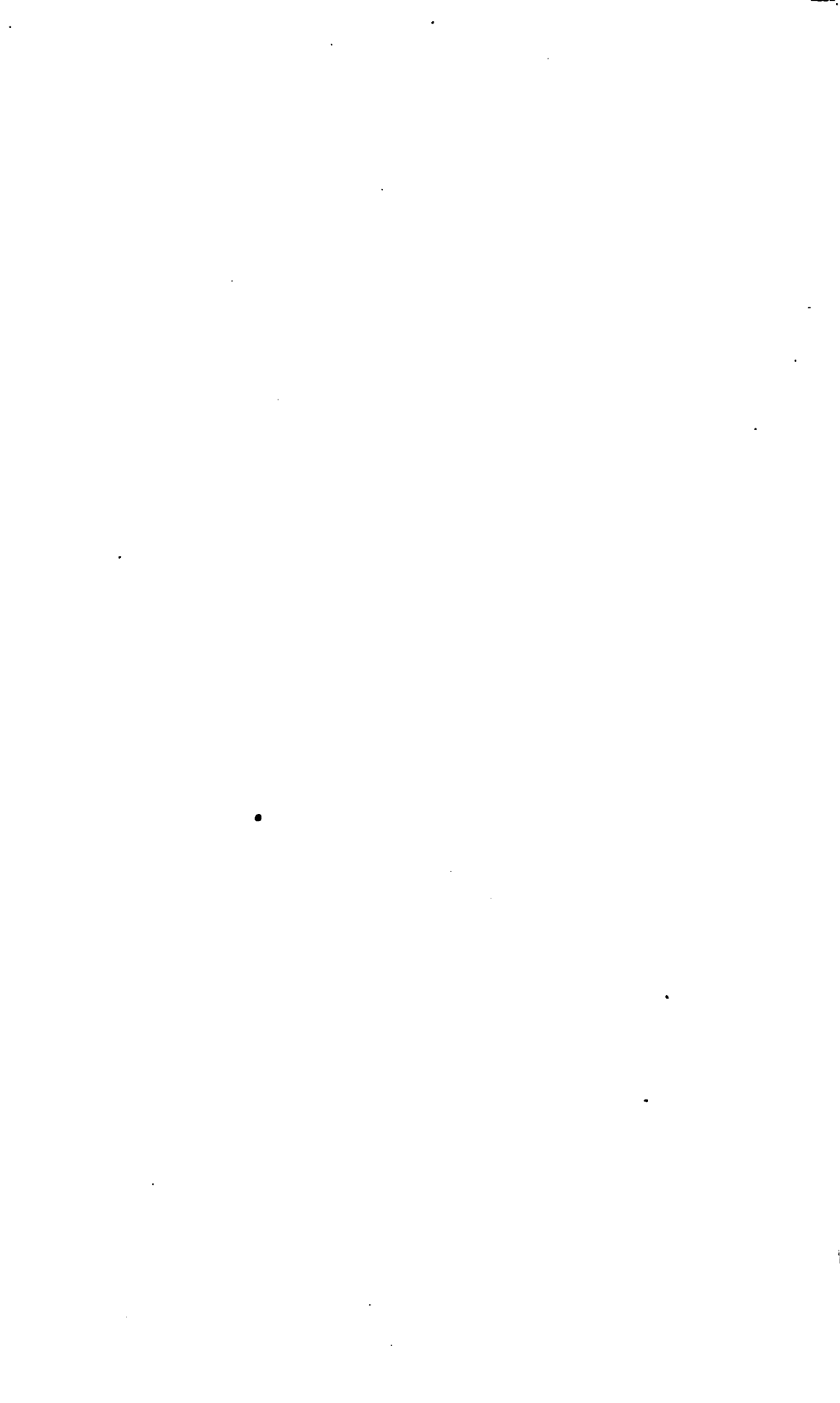
(2). *Amendment in.*

Where, on the trial of a cause under a writ of trial, it appeared that there was a variance between the dates in the writ of trial and in the issue, and such variance was amended by a Judge's order after the trial, the Court would not allow the defendant (who had proceeded in his defence after taking the objection at the trial) afterwards to object that such amendment could not be made, and that the proceedings were irregular. *Farnwig v. Cockerton*, 169

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Bank of India,
1888.

South
W. W. W. W.

be given to the second question. For if the execution of this power by the deed of September, 1828, be invalid, then no estate passed by it, and the original limitations contained in the deed of 1812 remain still in force. We think, after full consideration, that this power was well executed, so as to convey the estate for life of the wife, and the estates tail of the children, to the trustees under the deed of 1828.

We cannot adopt the principle laid down by Sir John Leach, in affirming the certificate sent by the Court of Common Pleas in *Badham v. Mee*. It is not clear that such was the ground on which that Court made their certificate, the reasons for which were not given by them.

We do not think that it is right to translate into words the effect of the appointment under the power, taken in conjunction with the other circumstances, and then to consider whether such limitations could, according to the peculiar rules affecting the transmission of landed property, have been legally inserted in the original deed. The utmost extent to which the principle could be carried (and looking at the principles which govern the execution of these powers, which were originally mere modifications of equitable uses, taking effect as directions to trustees, which bound their conscience, and which a court of equity would compel them to perform, it may be questionable whether even this ought to be done,) would be to insert the limitations actually contained in the appointment itself in the original deed, and then to examine whether such limitations would be repugnant to any known rule of law. Now, if we do that in this case, no difficulty would be produced. Here, if the limitation of the estate made by the appointment under this power had been inserted in the original deed, there would have been no incongruity upon the face of that instrument. A fee would have been given to Brown and Beynon, the trustees, and no more. But then, in considering what operation such a deed, good